

(4)

Actions August 1st 1828.

1st 'Covenant broken'. This is founded on a covenant and claims a recovery ^{for damages} for a breach of it. 1 Dougl. C. 244. 5 1 Bac 526

Covenant is an agreement written & under seal of. Fitz 340 may be by deed poll or by indenture [it in the Exp^d Dig 266] latter case it is suff^t. to maintain an action on C 212 that the covenantor is he ag^t whom the action Exp^d Dig 266 is bro^t that he has sealed the instrument.

The usual remedy to enforce a covenant in a Ct. H^u 1069 of law is an action for damages, on the Covenant Ball^d 1167 but where the covenant is for the pay^t. of a sum certain or for something wh^{ch} by averment can be reduced to a certainty Debt will lie as well as 'covenant broken'. Thus A covenants to pay B \$2 per cord for every cord of wood that B will deliver to him in one year B may maintain debt averring that he delivered 100 cords.

But where one covenants to do some act in specie Dougl 27 the more common remedy is in Equity. But where 139. 156. it appears from the nature of the contract that 1 Bac 526. damages will be an adequate remedy a Ct. of Equity 2 Dougl 341 will not interpose. for Eq^y never interposes where 10 Dougl 570 an adequate remedy can be obtained at law 1 Forb 627 vide 'Dowers of Chancery'. 109.

But even where damages are an adequate remedy if fraud is mixed with the damages equity will still award damages if the fraud is disproved

1 Eq. cas 17

2 Boult. 216. Vide Powers of Chg.

1 Bar. 69.

526.

But even in this case the Chancellor cannot apportion the damages unless they can discover the damages by computation but he directs an issue at law. —

Exp. 2267

2 Litt. 384.

4 Co. 80.

All covenants are either covenants in deed or covenants in law which means merely that all covenants are either express or implied. An express covenant is one expressed in terms in the instrument itself an implied covenant or cov: in law is one raised by implication of law. Ex. gr. A makes a lease to B with expressly entering into any covenant the law implies a covenant from the words of demise & from the nature of the contract that A has good right to make a lease & that B shall quietly enjoy. provided there is nothing on the face of the deed which excludes the implication. — On the grounds that any words purporting to transfer a title imply that the person using them has title to transfer and this is true in transfers of personal property. Ex. I sell A a horse —

2 Kaim. 111

Exp. 2167

116.

It is said in 4 Co. that these words imply a covenant not in cases of conveyance of a freehold but only in case of terms for years. No reason for this distinction & no such acknowledged in the English books.

The difference between a covenant in deed & a covenant in law is that the former arises from the construction of the words used in the instrument 5 Co 17. the latter arises from the nature of the agreement. Baith 48. not from the construction of the words used in the covenant. 2 Colles 52

On an implied covenant if good title the lessee may maintain an action agt the lessor before he has been evicted if the lessor did not have good title. but on the implied covenant of quiet enjoyment the lessee cannot maintain an action before eviction. 4 Co 80 Baith 48 Exp 267. 5 Co 17. 2 Colles 92.

Covenants again are real or personal. a real cov. is one by which one binds himself to pay or spare things real. Co Litt 139. Fitz 343. Exp Dig 294 266. 5 Co 16. 17. No prescribed form of words necessary to the creation of a covenant. any words showing an intention to covenant under seal. is a cov. 267 657 Ex 'reserving rent' is a covenant to pay rent 1 Don 242 even where the covenant is a deed poll signed only by the lessor. for the lessee accepts the lease Co Litt 141. 2 Exp Dig 267. It is so that these words 'reserving rent' is a covenant in law. but it is clearly a covenant created by the words used. 1 Don 241. 2.

(12)

A covenant may be of something past present or future. Ex of 1st Ship master covenants that he has not deviated. Ex of 2nd I covenant that I am well seized. Ex of 3rd Covenant for quiet enjoyment. &c.

Covenants in law may be excluded or restrained by express covenants. expressum facit cessare tacitum. hence when there is an express cov^t as to the same subject matter as that concerning which an implied covenant w^d be raised the express covenant restrains or excludes the implied one. Ex. I demise lease &c. I covenant ag^t any eviction from myself or those claiming under me this excludes the implied covenant of quiet enjoyment. This rule is plainly founded on the intention of the parties.

bro C 214
Exp 288.
H 6050
It has been said that on the implied contract raised by the words 'lease &c' an action will not lie for an eviction by a stranger but this refers merely to a total eviction but an action clearly lies for eviction by a stranger under param. title.

A recital in a covenant of a former
parol agreement converts that parol agreement
into a covenant

346.465
 1 Dec. 122
 Exp. 5268.

As to covenants in deed if the word 'cove-
 nant' is not used there must be some
 term or terms which does denote an agreement.
 Ex. Lessee covenants to repair provided Roll 518.
 the lessor shall furnish timber. the proviso Exp. 5267
 is a condition not a covenant. but if
 it were thus Lessee shall repair provided
it is agreed that the lessor shall provide
timber here is a covenant on the part the
 lessor to provide the timber.

Wherein a clause in a deed ^{is in nature of} a defeasance
 it is not a covenant 1 Sid 48.

But a Ct of Equity will often treat a mere
 defeasance as evidence of a parol agreement to
 perform the defeasance. Ex. penal bond to
 convey land.

Construction of covenants.

II. To be construed liberally. is the meaning
 of the parties is to be sought with that strict
 adherence to technical rules as prevail in
 case of deeds executed. —

Roll 419
 Plowd. 140

Hence a literal permannance will not
 always discharge the covenantor.

Bro. 27
 1 Sid. 418.
 Exp. 5207

If one covenants that his child being under the age of consent shall marry & the child marries but coming of age dissenting
 1 Dec 52 the covenant is still performed
 2 Feb 270

If a life covenants to leave all the timber on the land at the expiration of his lease & he fells all the timber & leaves it on the land this is a titheful performance but no performance in law.

May 464 A brewer covenanted to deliver to & of all the grain of his brewery. he d^d the grain mixed with ashes & was destroyed then the was held to be no performance of the covenant
 1 Dec 49
 242
 1 Feb 157.

Nov 102 When the roads are uncertain they are in good taken most strongly agt. the covenantor.
 1 Feb 157.
 2 Feb 271. If most beneficially for the covenantee

5 Feb 214 If I covenant to convey Blackacre to I say
 7 Feb 157 my house & tomorrow convey Blackacre to
 12 Feb 2430 I B I am immediately liable on the
 2 Feb 522 covenant. for by voluntarily disabling
 6 Feb 110 myself from performing I am deemed in
 12 Feb 2430 law to have broken it from that time.
 2 Feb 522

The language of exception may or may not
amt to a covenant. *Comyn Dig Waste c. 2. Bro & Co 657*
Barth 232. Salk 196. 11 Mod 170. 1 Don 238.

The rule is this where a lease is of a given
subject except a certain part of it the excep-
tion is not a covenant that the lessee shall
not occupy the excepted part. if he does *Don 238.*
occupy he is liable in trespass not in covenant *(Hb).*
for this exception is mere description.

But where the exception is of a right or
profit issuing out of the thing leased here
the exception amts to a covenant that the
lessee will not disturb the lessor in the
enjoyment of this right or profit. Ex right
of way. —

There is said to be a difference in construction *3 Dan 1640*
between exprep & implied covenants viz that *1637.*
an exprep covenant is to be construed more strictly *3 East 233.*
than an implied covenant. — Thus if one *5 D R 259.*
covenants absolutely to do a thing which he is
prevented from doing by inevitable accident
he is still liable on the covenant (if thing
is not physically impossible). for if it was the
intention of the parties that inevitable accident
sh^d excuse performance it sh^d have been exprep.
the covenant is in nature of an insurance.

Again one covenants to pay rent for a house *2 Stra 763.*
absolutely he must pay tho' the house be *13 R 701.*
burnt down. *310.*

17 Feb 636. 5 Feb 270. 22 Ray 1477.
16 May R 238.

(16)

On an implied cov^t for use + occupation the lessee is not to be obliged to pay rent under such circumstances.

1850

1 Forb 366 There has been attempts to obtain relief in
37 (n) Equity by the lessee in the case above of an
3 Alston absolute covenant to pay rent. But it is now
687 settled that there is no relief in Equity.

18 Vesey Jr 115

1 Forb 366 On implied covenants it is said that such
Goy 259 inevitable accidents excuse the covenantor.
3 Burr 1639 Ex on the implied covenant for quiet enjoyment
the lessee

The whole amt^t of the diversity is this, the law
now implies a covenant ag^t inevitable accident.
This is not a difference in construction. The
difference is in the covenants themselves

It is laid down as a gen^l rule that express covenants
Walk 191 are never discharged by any collateral matter, but
II If one covenants to do an act wh^{ch} is lawful
but becomes afterwards unlawful by st the cov^t
is discharged

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III If one covenants not to do a thing & a subseq^t
stat makes it his duty to perform the act the
covenant is discharged

(17)

But if one covenants not to do an act wh^{ch}
at the time was unlawful and a subseq^t st merely
makes it lawful this does not discharge the covenant

1. Covenants respecting any genl subject matter is confined in its operation to that subject matter whh was in being at the time of the covenant. Ex lease covenants to pay all taxes 1 Lev 68 during the term a new tax after the commence. 1 Vent 223 of the term is not within the Covenant. 37 R 377

An assignment of a bond &c under seal tho' not valid as an assignment is still a valid covenant on the part of the assignor that the assignee shall have the full benefit of the bond

Little 204.

Bro E 380

Ch on B 2.3.7

2 Vern 540

Ray: 683 (5)

1242.

3 Kel 304.

1 Br C 317.

A covenant in one deed cannot be pleaded in bar of an action on a covenant in another deed unless the former is a discharge or release. Ex for a limited time. binds covenants not to sue his debtor, this is no bar to the action for this is no release it is not a perpetual release for this is not the intention of the parties. neither can it be a release for a limited time for a personal right once suspended is gone forever.

2 Vent 217

Exp 2 335

Talk 573:5

3 Talk 296.

Bro 300.

623.

Exp 3 306.

Bro C 426.

2 M 126 10 (w) Hol 10. Carth 63. Talk 573.

But if such a covenant (not to sue &c) makes part of the instrument sued upon, does bar an action till the time expires. for the two parts are to be viewed together & the whole instrument together shows that the sum is payable in future. So Ray: 690 Exp Dig 306.

57 R 413

65 R 707

1242

(18.)

And one covenant may thus be pleaded in bar of another when they are in the same deed
5 R 737 even tho' one is not in defaultance or release of
5 R 403 the other.

16 R 152

2 R 492.

X The rule itself however that a mere covenant
2 R 384 not to sue within a limited time is no bar
or release applies only to personal actions for
in the realty a release for a limited time
is not a perpetual release. and the reason
of this reason is highly technical thus there may
be differ^{ent} gradations of title to real property, but
not so in personal rights.

5 R 170 But a bar by a coven^t in another deed never
171. 406 to sue his debt^r may be pleaded in bar to
5 R 446 an action on another covenant for tho' it is
6 R 332 a release & may be pleaded ex nomine. tho'
2 Bul 290 rule is made to avoid multiplicity of suits, for
if to recover he may be made to refund the
whole by an action on the covenant.

8 R 165. of covenant not to sue at all one of several
171. if several debtors is no bar to an action
2 Ray 690 ag^t either of them. for this an actual
11 Mod 254 release to one is bar an action ag^t both
12 Mod 551 or either yet a cov^t in this case is not construed
a release for his intention is clearly not to
release the whole debt. If the C^r in this
case sues both he must recover & he will be
liable on his covenant but he may sue B.
with any danger from his covenant. —

But suppose the covenant was given to one of two joint debtors. I think the covenant will be a release to both for as he cannot sue one without suing both, by covenanting not to sue one therefore he clearly intends to release both.

But a covenant not to sue a debtor in a foreign country is a good bar to an action in that country. for considering this cov^y as 2 H Bl 603 a release in one place is not considering it 177.
a perpetual release.
Comyn 2159
3 Hall 241
Hollot 204

But a covenant to exclude one's self from 2 H Bl 606 the tribunals of his own country is void & on this principle a submission to arbitration is revocable by either party before award made.

Covenant used in conveyances.

In all deeds except quit claims (of conveyances) there are regularly two covenants expressed a 4650 (H) implied. I Cov of seizen. or of good title II Cov of warranty. or of quiet enjoyment according as the estate is freehold or less than freehold. These regularly exist unless there is something on the face of the deed which excludes them. When therefore these cov^s are not 1 Roll 519. 20 expressed they are implied unless something Exp D 66. 5. to exclude them.

(20)

Cor. of seizen or of good title is de presentie
if then he is not seized & his cor. is broken
Or. j 369 if at age at the very instant the deed is deliv?
176. On this cor. therefore the grantee or lessee
96060. may sue as well before eviction as afterwards
Kilb 3.

In an action on this cor. it is suff. to aver
Crof 369. that the cor. was not seized until arriving
170. who was and then the onus prob. lies on the
96060. Deft. to show that he was seized if then
Exp Dig 299 he makes out a title prima facie good
the cor. must show that some other person
has a higher title.

7 John 376 And this covenant is broken not only by a
John 10 total want of title but by an existing
3 East 441. incumbrance on the land unless the incumbr
Sellep 433 is excepted in the covenant.
437.

Sellep 433.7 But when the cor. of seizen is broken by an
existing incumbrance only the cor. must
state specifically what the incumbrance
is the genl. allegation that cor. was not
well seized is not suff. for the cor. is in
genl. well seized & therefore has a title prima
facie & the burden of proof therefore
lies on the covenantee

The cor^t of warranty or of quiet enjoyment
de futuro in its terms and operation - both
 these covenants are strictly personal tho' ^{the} are 4 Br 419
 frequently called real. they entitle the cor^r to 50. 66.
 only to damages. the old warranty was real 1 Ves 511.
 2 Bl 304.

There can be ^{no} recovery on this cor^r until the
 covenant is evicted & it must appear in the
 declaration that he was evicted under close &
 good title & it is not suffice that he alleges that before
 he was evicted under good title. by suit by action
 or by lawful right & title for these might have
 been derived from him.

60 E 917
 Ep^r 301
 2 June 177
 46 306
 12 E 379
 40 314
 35 9
 60 E 917

But if it appears in the declaration that the cor^r
 was evicted under close title it need not
 be formally alleged. tho' the latter is the safer
 mode.

Ep^r 302

It is not necessary to allege in dec^r the specific
 title of the person evicting him - It is said in
 46 2 2nd 377 that the cor^r must allege under
 what title he was evicted if this means more than
 that elder title must be alleged it is not
 law. The reason why law title must be alleged
 is that cor^t of warranty does not extend to
torious entries.

2d 377
 45 R 611
 40 400
 Ep^r 303
 301. 40 314
 45 R 617
 3 De 514

(22)

46695
606212
Ira 400.
Exp't 274.
A person however may covenant ag^t the tortious
acts of stranger & in this case it is not necess^y
to allege elder title. But in special coveⁿ
ag^t the acts of him extends to his tortious acts.

18671
Exp't 30237
If the covenantor himself under claim of title acts
or disturbs his grantee by even a tortious act as
a trespass the covenantor is liable on the coveⁿ
for quiet enjoyment &c. & this holds even when
the coveⁿ in terms extends only to lawful encroachings
Because he cannot defend himself by saying that
his own act was tortious.

Comp 242
Where the eviction is by the lessor himself the
eviction suspends the rent. but by a mere trespass
act not amty to an eviction does not suspend
the rent.

Exp't 302
Exp't 2574
18671
These rules hold also where there is a tortious
eviction by any person included in the covenant
by the Ex^r heir from tho' the heir be not named.)

Consider the circumstances in each case for determining.

18671
Exp't 2574
A coveⁿ by Ex^r or others as such for quiet enjoy^t is
restrained by construction to acts by the Cor^d or by
some one claiming under him. for an Ex^r acts
and therefore can be liable only in his representative
capacity, by consent only to perform the testator's
intent such as it is.

Rule of Damages.

Diff: on the time costs on the cor: of seizen
 where the Plf recovers, he recovers the cons: money
 with the int^t from the time of pay^t or the time
 when the cons: draws int^t.

2 Callap 433. 445

4 Callap 108.

4 John 1. 5.

2 Rest 294

Ric 63. 4 Callap 45. 1 Selwyn 551. 46. 1 Do 108.

On the cor: of warranty in Engl: the Plf is
 entitled to consider money & int^t and damages for
 the costs of the ejectm^t from the land.

4 John 3

3 Gaing 111

But he recovers nothing for the improvements
 or for the increased value of the land - same rule
 in New York.

In Court on cor: of seizen rule the same as in Ric 63
 Eng^d but on cor: of warranty the rule of damages
 is the value of the ^{property} land at the time of the
 eviction of the costs of ejectm^t. (same in Callap.)
 This rule accords with the gen^l principles of
 the law. the damage is in gen^l at the time
 of the breach

2 Callap 440

3 Do 543. 6

On the cor: of seizen the assignee of the grantor can
 maintain no action ag^t the grantor for the
 cor: of seizen was a mere right of action at the
 time of the deed made of this cannot be assigned.

17 (a)

Buller 185. 4

10 L. R. 3. 11

3 Co. 22. 3

3 John 4. 1

5 Do 120

2 St. 1.

10 L. R. 295. 2 Callap 439.

(24)

But on the cor: of warranty broken after
5 Co 156 apportionment the apportioner may recover agt the
1721 first grantor or any subseq: grantor. for
the cor: is broken in the time of the
apportion of this cor: runs with the land. but
16 Mont 244 an intermediate grantor who has not been
damified. can't recover on the cor: agt
a prior grantor.

which is by way of a proviso or caveat with
cor: from the immediate grantor.

5 John 49 In an action on the cor: of seizure the Def: &
2 Saund 171. having acquired title after the action brot is
30 R 116. no defence for tho' the subseq: acquiring the
4 East 507 title will come to the Def: on the doctrine of
estoppel will not destroy the action but it
will mitigate damage JG thinks.

When an action of disseizin is brot agt the grantor
9 Ash 25. the grantor ought for the sake of safety to reach
3 Bl 300 in his warranty to appear & defend the title.
2 Roll 346 when the estate conveyed is freehold the proceeding
is called voucher in the warranty - the warrantor
is not bound to appear.

Co Litt 101 In Engl. law is done only in real actions but
365 here the cor: is vouched in both in real
Pak 39 actions & in ejectment.

Covenant broken (102).

(257)

In Court the mode of reaching is by a writ of summons called with us a writ of voucher. if the grantor is not vouched in & recovery fails & 21 is had agt the grantee when the grantee seeks the grantor on his cor! the record is. *Reak* 39. no evidence that the grantor had no title *1 Kk 396* but if the grantor had been vouched in the record w^d be conclusive agt the title of the grantor. *Chol* 346 to appear

But claim deeds contain neither of these covenants these are in Eng^l called release. — Because such deeds release merely the indulgent with the grantor has he professes to have no title. *gr* 224, 128. *fact* if it is a bargain of hazard. but formerly *Sal* 211 in this state many such have been maintained *2d Ray* 1118 agt quit claimants of a misrepresentation but *37 R* 51 it has been held that the action of fraud in *Eng* 196 this case will not lie & this seems to be the rule in Eng^l. But there are opinions in the English Books with countenance the right of recovery in this case. but this is not the better opinion. yet allowing this to be the rule in Eng^l it ought not to be the rule here — the reason of the rule is that the grantor ought to have had covenant inserted if he intended to guard agt a bad title or agt deceit in the quantity of quality of the land *Co* 114 *354* *15m* 366 *Cr* 113 *32* 25557 *Comyn* 113 *Act* 1. 48. *2* *Car* 193

After the case in 2 Bay the same Ct holds that if there was a conspiracy to defraud a person in the purchase of land the action w^d lie.

All covenants in conveyances do or do not run with the land. Ex cor. runs with the land when the oblig^y created by it passes with the interest to the assignee. Secus secus and it is then called a collateral covenant.

Rules for determining when cots run with the land & when not. But

1506 C. 45. IIth The assignee of a lease is liable for breach of ex cor. happening during his possession if the cor. runs with the land secus secus. (even tho the assignee were not named.) (this "I covenant" merely).

II. When thing covenanted to be done or concerning which something was covenanted to be done was in spe at the time of lease made & was parcel of the thing leased the cor. runs with the land. Ex cor. to repair the buildings devised this runs with the land. So cot. to pay rent by lease without naming assignee the cor. runs with the land & the assignee is bound rent is potentially in spe for rent is regarded as a part of the annual profits. 1 Roll 591. Grae 533. Buller, 4 P 159. 1 Mac 534.

3 Burr 1271 If the thing covenanted to be done or concerning which
5 Holl. it was not in spe at the time of the demise or
Bro E 532 not parcel of the covenant is collateral. Hence
3rd R 393 in this case the assignee is not bound unless
he is named & not always if named. — Ex cor. by lease to build a wall de novo on the land the assignee is not bound unless named.

But a covenant wh^{ch} goes to the support or preservation of the thing demised does run with the land. Ex cor^y to repair a wall or house &c 246.

On a similar principle a cor^y to leave a certain 3 rev 233
number of acres of land demised yearly untilled &c. 203.
runs with the land

246 215
246 225
232.

On a cor^y wh^{ch} runs with the land an action 2 East 570
will lie ag^t the assignee of a part of the land Bro 222
or of the buildings.

3^d When the assignee is named they are obly
in gen^l to perform all the covenants of the 5 Co 166
less they are bound tho' the cor^y does not run 1 Bac 534
with the land. Ex cor^y for him^s / assignee to build
a wall de novo — for when the cor^y runs
with the land it is annexed to the int^y whereas
the int^y goes but where cor^y does not run with
the land the cor^y is not annexed to the
land but by accepting the assignment he
adopts the cor^y in wh^{ch} he is named.

But if the thing covenanted to be done is, 5 Co 166
altogether unconnected with the demise the
assignee is not bound tho' named Ex cor^y to Bro 9435.
build a house on the lessor's land, or to pay
a collateral sum not as rent, he is not bound
tho' named —

When the apigree is bound by the lease
 cor^t he is bound only for such breaches as occur
 1 Salk 149 during his own time i.e. during the term of his
 3 Burr 1271. inst. for the apigree is bound on the grounds of
 20 Ray 338. privity of estate & therefore follow the interest
 1 Don 443. If then a breach happens before or after the
 1 Don 356. interest of the apigree he is not liable. If then
 whose rent is payable annually the apigree apigres
 the day before rent becomes due he is not liable
 for any part of the rent. Earth 177. Don 735. 1 Don 350
 3 Co 22. 1 Salk 51. Hutton 71. Ballouet 159. Don 440
 1 Burr 22 and so strict is this rule at law that tho' the
 1 Burr 22 apigment was to a beggar still no rent is due
 Ballouet 159 from the apigree - if the assignment is a new
 1 Mol 72 lease he may be subjected but if the intention
 1 Mol 445 is that the apigree shall hold the rent cannot
 1 Mol 329 be recovered of the apigree

(331)

Rule the same if he apigres to a feme cor^t
 Don 435 -

60224) The liability of the apigree follows the estate but
 the liability of the lease arises from privity or contract
 and follows the person.

1 Hen 165 But a Ct of Equity can appportion the rent in such
 57:8. cases as those mentioned above. as where the apigment
 1 Don 351 is to a beggar.

353. It has been made a question whether a Ct of
 Equity will restrain an apigree from apigring to
 2 Atk 319 to a beggar &c. this has never been determined
 1 Don 351 but it has been determined that the Ct will not
 restrain him if the lease offers to deliver up his
 lease to the lessor

But if the ^{lessee} lease is created from part of the premises the rent can be appportioned at law. 2 East 575.
for as privily of estate is the ground of his liability he must pay as far as this privily of estate exists.

The rule is the same in debt for rent as the original 2 East 575.
lessee who has been evicted of part + yet the lease 36022 (46)
cannot in such case be subjected in cor: broken to any part of the rent. for the lease's liability on the cor: arises from privily of contract and an entire contract cannot be appportioned -

A term is apportionable unless there be a cor: not 57R800
to apportion. formerly doubted whether this cor: bound 57.6.
him. now settled that it can be binding. - Comf 803
rent in fee simple cannot be bound by such cor: 133.
for no person can be injured by his apportionment Exp: 2276
but, term of a term by apportioning may injure the remainder man.

Still such cor: is not broken by his Co taking 57R57
the term in Exp: for this is not a voluntary 2 Eq: ca 100
apportionment. Neither is cor: not to apportion 3 M: 237
broken by an underlease.

Na is such cor: broken by a bequest of the 57R59
term for on the death of lease the term must 2 M: R 766.
go to some person: 3 M: 234.

The original lepa continues bound by his express cov^t for any breach happening during the term 3 Co 22:3 notwithstanding his apignment: not in debt
 120 after apignment but in cov^t broken.
 47 R 98
 100. 1 Salk 199 1 Font 353:4

But the lepa may by his act discharge the lepa from all liability ^{in the action of debt} for breaches after the apignment
 Cro J 334 If the lepa has accepted the apigne of the
 1 HBL 444 lepa for his tent he cannot maintain debt
 1 Font 354 for rent accruing after the apignment as the
 3 Co 22 (ab) original lepa
 1 Sa Diges 574.
 Cro J 309 But by accepting the apigne as his tent the lepa
 522. does not preclude himself from maintaining
 Ball AP 157 Cov^t broken ag^t the origⁱ lepa where the Cov^t
 1 HBL 433 is express for accepting rent merely discharges
 444. the privity of estate not of contract.
 1 Font 354.
 1 Saund 237.

But where there is only an implied cov^t on the
 1 HBL 437 part of the lepa if the lepa has accepted the
 Cro J 522 apigne as his tent he cannot maintain any action
 1 Pil 447 for a subseq^t breach. for him there is no
 1 HBL 437 privity of contract + privity of estate is destroyed
 3 Co 22 (ab)
 1 Saund 241 (ab)

1 HBL 435 (ab) The lepa may accept the apigne as a tent by
 express assent by receiving rent &c

When the cor. for rent is ~~repay~~ the lepa may pursue his remedy ag^t both ~~repa~~ & apigne at the Crof 523 same time but he can enforce only one exⁿ for any thing but cost.

But if after having collected his debt on one exⁿ he attempts to enforce the other the debtor may have relief by ~~auditor~~ ^{auditor} querela.

By St 32 48. the grantee of the reversion has the same remedy ag^t the lepa as the original lepa 17m 6345
~~for the cor. & remedy with the land~~ Cott 215
 hat, by ~~the~~ the grantee of the reversion contd 3 Co 22
 have no remedy ag^t the lepa. and the lepa Crof 522
 by same st has the same remedy ag^t the the Crof 522
 grantee ~~of~~ the reversion ^{as} ag^t the lepa.

There is a material difference between an apigment and an under lease, an under tenant is one who 31m 6234
 takes only a part of the term residue of the term 2 Bl 276
 (or he who takes the whole as lepa to the apigne)
 In these cases there is no privity between the tenant & the original lepa for the original lepa as to us Long 438
 but has come into the place of lepa. hence an 174.
 under tenant is not liable on the covenant in 17m 634
 the original lease, nor on any of them. The privity of cor^t between lepa & apigne arises from privity of estate but between under tenant & lepa there is no privity of estate & therefore no privity of cor^t.

See vide 1 Helgus 575. & Cur 456.

(32)

The rule formerly was that the mortgagor was liable on none of the cots^r even tho' he took the whole residue of the term unless he took 1. A.R. 114 possession for he was considered as a new tenant 502 in consequence.

But this rule is now denied. It is now held that a mortgage taking the whole term in pledge is ex apigne & therefore liable on the cots^r even tho' he does not take poss: 3 Atk 511 I doubt whether this latter rule will finally prevail 7 R 306 in all.

Stia 405. An apigment is a sale of the lessor's whole interest to one who takes as tenant to the original lessor. —

Long 177 Apigment properly so called are liable to the cots^r on the lease according to the distinctions heretofore taken & such is the case whether the apigment is by deed, by devise or by operation of law.

Stia 407 If a lessor cots^r for himself and apigment is long 2 Comdij as he or they continue in possession and the 564. apigment holds only the apigment and the lessor are liable as they were before for he is now apigment in fact of the term

Whether an apigree of part of the premises is liable to, the lease for rent is not well settled yet in analogy to the case where the Co. C 633 apigree is ousted of part it w^d seem that Comp 766 he is liable and that the rent can be divided 2 East 577

Covenant for the part of money by instalments under wh^{ch} I shall consider bonds to pay by instalment.

On a penal bond condition to pay money by ~~at~~ at diff^t times an action of debt will lie for the first breach & at C L the whole penalty was recoverable

10th Ed 115
1 Mil 80
13th 575
514
Bulst P 168
Exp 205.
Ex 558

Co Litt 47 (6) 292 b 10 Co 28 b or 128 b. In these cases it is said that debt will not lie until the last instalment but by bond in these references is meant a single bill and

Bulst P 205
1.4 Ed 548
Exp 205

On a single bill debt will not lie where money is payable by instalments until whole becomes due. For in this case the debt is entire and cannot be divided & here is no condition as in the case of a penal bond the breach of wh^{ch} can accelerate the pay^{mt} the whole penalty

1 Roll 601
Co Litt 47 (6)
292 (6)
10 Co 28 (6)

By our it in relation the penal bonds payable by instalments the Pt recovers only his actual damage viz the first instalment

In Conn! then judgt should be given on the bond and Ex^r should be issued as the instalment becomes due.

If rent is reserved quarterly, & an ^{action} ~~action~~ ^{debt} will lie at the end of the first quarter for rent is considered as the reservation of the fruit of the land & these reservations are in the nature of distinct debts. Ex^r 1000 a year payable quarterly but on a single bill the diff^t instalments are not distinct debts.

But on a count or note for an aggregate sum by instalments ~~the action~~ ^{an appropriate} when the first instalment becomes due & the action may be repeated toties quoties for the action is here brought for the recovery of one instalment.

Co. E 175.

3 Co 22(a)

4 Co 94(b)

8 Co 153.

Salk 165.

Bullock 166

1 H Bl 547

bro E 776

8 Co.

But on the same cor! debt will not lie until the whole instalments have accrued

Ch on Prom 212, 13, Ex^r Dig 205. (Credit contra)

There is an apparent contradiction in the books for the report frequently fails to show whether the instrument sued upon was bond or cor! & whether the action was debt or cor! looked.

Co. E 175.

3 Co 22(a)

4 Co 94(b)

This distinction applies to notes & parcel promises debt will not lie until the whole is due but a sum of will lie

The reason of this distinction is that Cor. broken is brot for damages for the breach of the Cor. & the cor. is here broken but debt is brot for some debt but here is no debt except the entire debt wh. by the supposition is not yet due

But there are cases distinct from all these in Cr. 776 where there is no aggregate sum in the case 807

1 HRC 530

Co E 118

Ball 168

In such case it is improper to call them receipts many instalments

Thus Cor. to pay \$100 at the end of one year \$100 at the end of two years &c. In such case the debts are several & I think that what doubt debt will lie as in the case of an annuity the case is the same here as if the distinct sums were in cont. or separate pieces of paper. Cor. broken will clearly lie.

If a Cor. for the pay^t of money by instalment contains a clause that on the non pay^t of any Ch. B 212 one instalment the whole shall be come immedi- 213. ately payable such clause is good & if the Cor. 505 first instalment is not paid Cor. broken or debt will lie to recover the whole for the whole is due by the express agreement.

(36)

In Cor' broken any number of breaches may be assigned in an account but at St
2 Wils 198 this cannot be done in debt or bail fa at
Cor' 297 C & the breach of one condition is a forfeiture
2 Wils 293 of the bond & the abatement of one is double
2 Lickson pleading.

But in Cor' the rule of pleading on a penal bond
is the same as in cor' broken. indeed he must
assign all the breaches or he cannot recover for
all

2 Wils 377 St & 9 Wms is similar to one St & therefore
1 R 116 the Eng^t rule is pleading is similar to one
C & R 1016

III.

1 R 544

Cor' to save harmless. likewise bonds.

46.80 Cor' to save harmless as cor' to indemnify the
bro & 443 cor' to save harmless as cor' to indemnify the
1000 219 cor' to save harmless as cor' to indemnify the
Ex & 301 cor' to save harmless as cor' to indemnify the
275. cor' to save harmless as cor' to indemnify the

(37)

Extra 400 This cor' is not broken by the taking of a
third person but only by some lawful act. i.e.
or taking the surety's goods & converting
them — Ex abique cor' to save harmless
harmless from loss of rent & the surety's cattle
and dishonor.

But if we seek to save another harmless from the act of a particular person this extends to tortious acts.

1 Htt 400
Cr. 212
40035
2 Cr 37

In such case the cor'ee may sometimes maintain an action before any actual manifestation Cr 508 & this is the case in joint when the liability of

the cor'ee to a suit accrues after the cor' or bond was made 1 Root 570-11

Butt 400-11 Cr 244

Where a surety joins a debtor in an obligⁿ for the pay^t of a debt at a future time not in demand, & the surety takes a cor' of indemnity, if the debt is not paid on the day named the surety may immediately sue on the cor' of indemnity for the cor' is taken to mean that the debtor shall pay on the day named for pay^t.

2 But 244

Cr of equity will sometimes compel a principal debtor to pay up a debt in order to secure the liability of surety from perpetual jeopardy

17 John 384

When the principal debtor has been compelled to pay the surety on the ground of the surety's liability & has himself been afterwards compelled to pay the debt the Cr of Equity will compel the surety to refund the debt to the principal. It seems that abatement will not lie by reason of the supp^t vide 7 R 269. 2 Burr 1005 allow roll & England has been doubted & shaken. Fe. 2. 1821 414. 6. 19 R 665. 45 R 182. 1 Eng 130.

If one having obligated himself as surety takes a bond of indemnity, ^{he cannot maintain an action on the debt if the liability existed at the time of the contract} must show special damage. If & as, surety takes cor. of indemnity after he himself has become liable, he must sustain special damnification - so cor. of indemnity taken at the same time of entering into a single bill or demand or promissory note or demand here the surety is liable at the time of taking the cor. of indemnity & therefore cannot sue until actual damnification - for such a bond or cor. is clearly not something future if then the liability exists at the time of entering into the bond the liability is not the thing contracted against.

Comp 528
27 R 1024.5
27 R 100

If a surety having taken no bond of ind. pays the debt he may then maintain an action abumpsit for money p. paid out for the use of the principal but if he has taken a bond or cor. he cannot have abumpsit - where no bond or cor. is taken abumpsit cannot be maintained until he has p. the debt or done something equivalent to it. or committed an Ex.

Mich 13
Comp 528.
527.
17 R 579
3 Mich 262
346.

Where the surety has p. the debt his cause of action is founded on an implied promise of indemnity. — Suppose surety pays a debt whh the principal is not bound to pay, as usurious debt - or one to whh the St. of frauds may be pleaded - or suppose the contract illegal, vide "Notes"

This remedy by apportionment exists between
it parties & one of two it parties pays the whole debt. even tho' the principal is still solvent.

2 Bt P 267, 70
2 Day 419
Pak L 238
Marsh L 118
Bt P 235
Reas & Mor
L 42.

Where there are more than two parties the proper remedy is in Equity as in the case of parting

Effect of a release

A release after an assignment, in case of choses in action by the original holder is in some cases good in others not.

If the instrument creating a duty is not assignable a release after assignment by the original holder will bar an action

But where the instrument is assignable at L a release under such circumstances is not good

If the law on this principle after assignment of the reversion releases all costs to the defor the release will not affect the right of the assignee to recover on these covenants for the Cov. is virtually assignable at law by St H 8.

2 Lev 206
R. C 503
1 Foul 345.
4 Bac 279
Et release

(40)

But where a lease has been assigned by the lessor it is said that the lessor may oust his assignee of all remedy against the lessor by releasing them before the assignee has commenced an action against the lessor but 10 E.R. 308 can find no reason for this rule.

Acq. 99
Bull. 146
Chitt. 2nd ed. 67
Salk. 171
167
10 E.R. 308
A release before a cov. is broken of all demands does not release the cov. for there is no demand on the cov. before it is broken. So if the release were thus 'of all actions suits & damages' But a release in either of these forms given after a breach discharges the breach.

Exception.

such absolute cov. for the pay^t of a sum of money a release given before breach will discharge it for such a cov. is a present debt

The breach of cov. of seizure is present if at all, therefore a release 'of all demands' will wash the cov.

10 E.R. 308
167
307
But before a cov. is broken a release 'of all covts' will undoubtedly destroy a cov. of any kind.

Covenant broken (V.3).

(41.)

Cov^{ts} wht are joint & several

If two persons cov^{ts} j^{ntly} & s^{evrally} they may
both be sued in one action or each may be
sued separately. But if two persons cov^{ts} j^{ntly},
alone they must be sued jointly.

2 Hen 94
3 Bulch 363
37 R 752
Juli 26

If three persons cov^{ts} jointly & s^{evrally} two may not be
sued with the third for the contract
must be treated as altogether j^{ntly} or altogether
several. (unless one is dead &c).

These rules are common to all contracts -

Where there are two or more j^{nt} covenants or
obliges they must ^{all} join as p^ls for covenants & s^{evrally}
the debt might be sued in several actions for s^{evrally} & c^{ov}
the same debt.

If their interests are several they may sever, but
it seems nevertheless join

Where one cov^{ts} with two or more jointly &
severally, one of the covenies may be sued
cases sue alone in other they must all join

5 Co 18:19
Bulch 157
Juli 177
1 Stroud 153
2 Saepe 116
2 Hen 347
3 Co 166

If the intention of the covenanting on the face
of the instrument appears to be several, they

may sue partly & severally. Ex & s^{evrally}
habet to pay, p^{ro} to BVC to be equally

divided between them here each may sue
alone for here is no joint interest between

them & each of them may declare on
a cov^{ts} made to himself alone with many

the other, this is declaring accordy to the
legal effect.

2 Hen 347
3 Co 166
Ex & s^{evrally}
1 Co 166
Str 76:519
Co 1532

(42)

When a cōrt is in form & several yet
if the interest appears to be jōt & pl only
5 Co 136 they must all join as Pls. & demise of
1962 Blackacre to A & B with cōrt. to both &
jōnt 262 each of them still as the interest is jōt
10ast 497 they must join—
1 Bac 332

If two cōrt jointly & severally, each may be
12a 553 sued alone & each sued alone for a neglect
3 Ent 281 whh is entirely that if the other & negl of
6 Co 46 jōnt is no bar to an action agt the other
Co 978:4 tho' only one satisfaction can be obtained
5 Co 50. but the taking of one in Ex^o is not a
Ch 182 B satisfaction
Ch 124 B.

1 Barr 323 'We cōrt to' signed by one only he can be
27 R 32 sued alone as on a sole oblⁿ for such it
is in fact & in law

And if an ind^t write the names of A B & C
C & says A B & C covenant and is signed
2 Stra 146 by A & B only an action will lie agt A & B
1 Barr 343 alone (with averm^t it is said that C is
27 R 47 not sign but I think this averm^t unnecessary)

If two or more persons bind themselves together
 the contract is joint & joint only tho' the word 'joint'
 is not used provided there is nothing expressing that the contract is
several 5. Bur 2611 So Mansf.º says
 all contracts of this kind are jt & several but
 he means merely that the whole debt
 can be collected agt all or each

But if a cov. begin' 'covenant' and is
 signed by two the cov. is jt & several

Peak R 130

Str 76.

809.

S. Ray.º 1544

Con L 832

Ch B 175.

(44)

Simkins

The Decr must state that the contract was by
the Decr Decr

Co E 517

Co C 105. 209. Exp Dig 298.

The decr must always assign a breach &
when the cor is given a genl assignment of
1 Bulh 139 the breach is suff the breach need not be
Exp Dig 298 assigned more genlly than the cor!

As 6176

2d Ray 478

It is genlly proper to assign a breach in the
words of the Cor^r q 60 60. Exp Dig 299. Co J 369

Co E 348

Long 203

Exp Dig 299

The breach must be so assigned as to appear
clearly to be within the scope of the Cor^r
Ex Cor not to cut more timber than was
necessary for repairs & the allegation was
that Lepa had cut timber to the value of
\$100. this was held bad. Lepa sh^d have stated
that more than was neq for repairs was
cut.

37 R 307

If a Plf having alleged a genl breach after
words narrow it to a more special allegation
he is confined in evidence to the more
special allegation Ex he has no arg
in the land in unhusband like manner but
has committed waste' Plf must show waste

Where there is a proviso in a deed defeating the deed in a certain event the Plf need not set out the proviso. the Deft must make use of it for defence. for this is as a defeasance in a bond Ray? 65. Exp? Dig 300

But where there is an exception in the body of the deed the Plf must state & negative it for the exception enters into the description of the subject matter & is part of the cor? Exp? Dig 300
clause itself. Ex? agree! to deliver a bale of cloth with the exception of one piece of broadcloth. It is not suff? to allege that the Deft has not d? the bale for he is not bound to deliver the bale if not the whole bale. the allegation that the Deft has not d? the whole bale is perfectly consistent with his having performed his cor?

If a cor? is in the alternative the breach must be assigned as to both. Leon 250 Exp? Dig 300

But a cor? whh in phraseology is in the alternative is not necessarily so in legal effect. Ex? cor? to pay or cause to be p? here it is suff? to allege that Deft has not paid for if he ~~pay~~ he causes to be paid he pays. 10 Har 220 Exp? Dig 300

When the cor is to say he on the happening
 of one of two contingencies, which shall first
 happen it is suffice to allege that one has
 happened witht alledge that it is the first,
 for if one has happened the first has
 happened.

Sta 225 On a cor: for something to be done by one
 1 alk 139 or his apig: if the apigree is sued it must
 Ep: Dig 302 be alledged that neither he nor the coror
 has performed the cor: but if the apigree
 is agt the coror it is suffice to alledge that
he has not done it for an apigment
 will not be presumed.

1 alk 139 On a cor: to do an act to one & his apig:
 Ep: Dig 302 if an action is brot by cor: the allegation
 3 alk 440 need not be in the disjunctive but if
 5 Mos 133 the action is brot by the apigree of cor: he
 must alledge that it has not been
 done to him or to the coror.

In a case for a sum certain there can be
no assumption of the demand. Ex
court to pay \$10 p. ton + the beach spigues 20.124
is that he has not paid for 20 tons & 1/2 Ex 2303
the beach is ill for he must have paid for 20 tons
20 tons & he is not bound to pay for 20 1/2 tons

On the part of Def't.

II Performance, there has prevailed in
this state a practice of pleading to the
action that the Def't has not broken the
cov't but this is ill for it is avowing 2 Kent 16
no ipuable fact for this is altogether 2 Bl R 1312
argumentative + includes all matters 2 Allod 33
of law & fact of which the case is susceptible 10 R 278.

But it has been suggested however that if
the Plf concludes this & so the Def't has broken
his cov't it is competent for the Def't to plead
that he has not broken his cov't 8 R 278. 281
Selwyn Donadson. But I think that
this allegation of the Plf makes no difference
for this allegation of the Plf is not traversable
& besides by this plea the Def't admits the
special facts.

When some of the corts are negative the Deft may not plead guilty performance he must plead specially however multifarious the corts Cro E 233 that he has not done each act covenanted agt or that he has not done any of the acts Estlin 303 (C) covenanted agt but the plea of performance Comp 576 to a negative cor: is bad only in special demand. It is merely the use of improper words R E 25:6
 1st 2d 305

When some of the corts are upon the face of them void the Deft need not plead to them Hob 13 at all. the rule is laid down only as to negative corts but it is true of all I think, damo 283

When corts are in the disjunctive the Deft in his plea of performance must show which of them he has performed & his plea is ill in general demand. As ante 303/4 Cro E 554. 8 Co 133. 1 Bulst 177 Cro E 232. Comp 576 R E 25:26. But Bae 91 til Pleading this plea is said to be ill only on special demand. & I think this the correct rule.

When the cor: is to do some act which consists of matter of law the Deft must plead his performance quo modo. Ex cor: to come Land 9 Co 25.

As if one corts to do an act which must
cost 500 appear of record as to buy a fine for the
Court 3086, must show quo modo.

Bonds to save harmless & corts &c. in these
corts it is sometimes suff^t to plead non
damnificatus, in other he must plead
that he has discharged the P^lf and
also quo modo. Record 117.11.

II. If the cor: a bond is to discharge to the
Court 374 cor: from any particular thing ascertained
to be in the instrument, non damnif^t is not a
sufficient good plea, the deft must plead that he
completely has discharged the P^lf & of course must
show quo modo.
Co E 433

914
Record 115:1176 1180 396

Because the cor: being affirmative it must
be pleaded specially & being matter of law
the manner must be shown that the it may
judge whether there is an actual discharge

III. If the Cor: is given to save the P^lf
Hart 344 harmless &c it is suff^t to plead non
Co 363. damnificatus. for here the cor: is not
Co 344. to do any particular act & therefore the
L Co 4. deft need allege no act
2 M^g 126.
5 JR 307:10.

III. Even if the cov^t is particular yet if the sub^jed matter covenanted ag^t is not Cr. C 916 ascertained non damnificatus is a good Cuth 374
 1 B & P 634
 5 Colles 224

Ex d cor^t to discharge you of all costs arising from a suit wh^{ch} I may hereafter institute. C. th 375
 now supposed I institute no suit I cannot plead that I have acquitted a discharged you for I cannot do it it is therefore proper to plead guilty non dam^{nif}: & if I could not do it, I must unavoidably be obliged to say for there is no other plea

IV. Where non dam^{nif}: w^o be a good plea 1 Saunders 117 (a)
 still if the Def^t will plead affirmatively 2 Co 363
 that he has acquitted he must plead 4 (a)
 it specifically & also where it is matter Cr. C 916.
 of law state q^{uo} modo. Cr. J 363:4

But non dam^{nif}: is not good on a bond to pay money on a certain day tho' it appears from the condition of the bond that it is a bond of indemnity 1 B & P 638

And where one cov^t for an act to be done Cr. J 559:60 by a stranger the rules are the same as if 1 Showen! the act was covenanted to be done by himf Cr. J 305

(52)

Where the Deft properly pleads non dam:
1 Ser 83 It is not suff^r for the Plf to reply that he
1 Ser 2444 has been damaged genlly. but the replica-
tion must state specifically some damni-
fication.

Notes,

Ante pag. 38.

Suppose the surety pays ^{a debt arising from} an illegal contract knowing the illegality can he recover an indemnity of the principal? The contract is one step removed from the illegal transaction. The consideration is suff^t. I request you to pay a sum of money, whh I am not bound to pay & you pay it this is a good considⁿ. — She can resemble Petrie v Mcannay 32 R 418. & 4 Bun 2069, Map 139.

But suppose the ~~the~~ principal orders the surety not to pay & if sued to defend on the ground of illegality Is not the previous request irrevocable?

(56.)

This is an action founded on an ~~express promise~~
contract that one who has used another's property will
reimburse him for the use of it & to account for the
action lies to the person to whom he owes it -

This action is brought to compel the Debt to render an
account of the property or money of the Plf of which the Debt has
had the charge & administration & to pay to the Plf the balance due to him,

This action lies at C. only ag^t Baileiffs in socage & Est. 1721
& Bailiffs & receivers, this last includes joint, merch^t 40 (b)
common merch^t, guardian generally, agent to sell & pay over 1 Schynel
proceeds, Compens^t 1721
Acct^t 1721

But by Statute this action is extended in favour of
of one jt tenant a tenant in comm: ag^t the other 1 Bac 17, & 1721

At C. the action lay only between the origⁱ parties to the contract so that Exors neither
could be Plfs or Defts in this action. Compens^t 1721
Acct^t 1721
Cotell 1721

There was an exception at C. to this rule in
favour of Exors of jt merch^t but not ag^t Exors of
the dec^r partner (1721)

But Sts West 2^d &c have extended this action
generally in favour of Exors of Bailiffs &c & Exors of
Exors of bailiffs &c & to Administrators 1 Bac 17
Cotell 1721

The Statute extends the ^{act} ag^t Bailiffs & their rep 3 BLC 164
representing. & for ag^t Exors of jt tenants & tenants
in Comm. 1 Bac 17

By our st the action is extended to & agt
 it truly. truly in com. coparceners & to & agt their
 representatives, and to persons by legit. rep. &c.

In every case except that of bailees the Deft
 is charged as baileiff or receiver or both. Liab^y
 is charged in his character of bailees

A Baileiff is one who has use & control of another
baileiff to improve or make profit of for the owner &
 to acc^t for it. He of course is entitled to a
 reasonable allowance.

Copye Dig of baileiff may be liable for such profits as
sect 3 by reasonable industry he might have made
baileiff 172
2 Forb 187.8
1 Selwyn 264

1 Roll 119. A receiver is said to be one who has use money
Copye Dig to the use of another merely to account for it
sect 4 & who is not entitled as matter of law to any
baileiff 172 compensation. i.e. the law implies no contract
2 Forb 187.8. entitling him to an allowance. He is not
 bound to account for profits. but as between
baileiff 172 & st merchants the partner sure is entitled to any
Copye Dig allowance & must account for profits. st merchants
sect 10:13 are st to be receivers one for the other but it
 seems more proper to call them baileiff —

if new bailiff cannot be subjected in the
character of a receiver for if he could he
might be deprived of his compensation.

60C 172
1 R. 2. 119
1 R. 2. 19

This action being founded on privity of dealing
will not lie ag^t a wrong-doer. Except in
case one disposes to an infant the wife may
sue the dispozor as guardian.

Conjugal
act 28. 9
11 Co 89 (a)
11 Hen 4 36
16 Ch 489
2 Hen 2 95.
3 H. 2.
Ct 11 19. 172
R. 2. 229.

It has been determined in Barry that when
there are three or more of merchants a partner
this action does not lie the remedy is in Equity.
(Boardman & Layman 1808.) to prevent multiplicity
of suits for A & B cannot join as Defts ag^t C
neither can C & B be sued as Defts jointly by A.
now regulated by Stat. 1st ap^t

2 Bt 286.
2 Day 492
31

It is said that an action of acc^t will not lie
to recover a sum certain. Ex \$100 is d^t to A

Conjugal
acc^t a 3
1 Bae 19.

But I think this rule incorrectly laid down the
rule sh^d be that as bailiff one cannot be charged
for a sum certain.

for it is s^d that the action will lie ag^t sh^lff for
money rec^d on Ex^t so if one receives a bond debt
for another he may be charged as receiver

106 206
Conjugal
act 28. 3.

(60.)

It is in point when one person receives a sum
of money from another to account for it they
1 Bac 20:1 action will lie
2 Mod 101. Fitz 116:5 Lill 113.

Comyn Dig If money has been rec^d by A from B to acc^t
of C to C & for the use of C. C may maintain the
Count of Satisfaction of acc^t. but the Pl^f must alledge from
1 Roll 120. whom the money is rec^d.

It is presupposed in these rules that the money in
these cases that the money is rec^d on some
contract exp^{re} or implied

Comyn Dig If a man wastes goods he cannot be
acc^ted for. He is not to be subjected in acc^t for he has rec^d the
goods to traffic & account for but trover or
1 Bac 19. aumpsit or detinue will lie
1 Roll 116.

Comyn Dig If A as bailiff makes a deputy the original
Acc^t. d^r. q principal cannot have acc^t ag^t the sub
1 Roll 118. bailiff

16) An ist cannot be subjected in this action
Fitz 172a for he cannot bind himself by such a contract
1 Bac 17. & he is incapable of stating an acc^t properly
Fitz 118.

Carth 89 If he who receives the property of another to
1 Bac 20 account makes an exp^{re} promise to acc^t the
1 Salk 9 promise may have acc^t or a special action of
Kirb 164 aumpsit on that promise. If aumpsit is bro^t
354. do Holt say that the Pl^f shall not travel
Salk 9 into the particulars of an acc^t but must
Carth 89 confine himself to the special damage from the breach
Esp^r Dig 97.

But if this is the rule a judgment is plainly
 not substitute for the action of acct. I G
 therefore concludes that a recovery in a judgment
 is no bar to a subsequent action of acct but
 this is left obscure in our books.

For Smith Supp. 1880 The rule of law is apparent
 to acct. means to the person own or signifying the acct.

If one by deed acknowledges that he has
 rec^d property, to account the Plf may
 bring an action on the deed or may
 bring acct. for this is a case in which the
 deed does not merge the simple contract
 1 R. 111
 1 Bac. 14
 Cro. E. 644
 2 S. R. 477
 1 P. 211
 223. 225.

The finder of property is not liable in this action
 for there is no privity. Comyn & Dig. Acct. d.

Mode of proceeding in this action is this coming
 If the Plf succeeds there are two judgments 1st
 quod computet on this judgment auditors are
 appointed who are to examine & adjust the
 acct. the Auditors then make them an account
 & then the final judgment quod recipiant ipsas
 1 M. 99
 1 Roll. 42
 Comyn Dig
 Acct. 15.
 11 Co. 40 (a)
 1 Selwyn 7-9
 3 R. 164.
 These auditors hold a copy of their own & do not
 sit in presence of the Ct as jurors.

(62)

On the 1st issue the inquiry is whether the Deft is bound to acc^t on the trial before the auditors the question is how much is in arrears.

In Com^{ty} the parties in the trial before the auditors are entitled to testify & may be compelled to testify and on refusal may be imprisoned by the auditors.

Comm Dig
Acc & E 15
Co. L 106
3 Mills 117. If the Deft refuses to attend before the auditors a refusal to present his acc^t in Com^{ty} the Auditors & in Englnd the Ct^y are bound to award the Deft his entire demand in the declaration.

1 Bac 16 In C if the balance is in favour of the Deft the auditors award so much in favour of the Deft & just^{ly} goes in favour of Deft for his balance & his costs. (not so in Englnd.)

Comm Dig
Acc & E 4
1 Bac 21.
1 Roll 121. Deft may plead in bar to the action (in C to present first just^{ly}) any thing which shows that he is not bound to render an acc^t.
Ex non bailiff non recipit non bailiff and receiver according to the declaration.

Of release of all actions is a good plea in bar. 1 Roll 123. 1 Bac 20. And any defence which is virtually a release is pleadable in bar.
Co. L 12
4 Bac 15. Award of Arbitrators that Deft sh^d be acquitted

X But a plea that the Deft has the money to be do. over to D. & has delivered is a good plea. for if he recd. it to deliver over he was not a receiver to acc^t.

3 M. G. 114.5
G. S. 830
Common Dig
sect 55
R. & R. 120

But a plea in bar that the Deft has made pay^r a satisfaction of the money, due is not good to the action. for the plea admits that he was bailiff and that he is bound to account this is good before the auditors for this is good accounting.

6 Co. 7
1 Bro. 20
R. & R. 123.
124.

that the Deft has fully accounted is a good plea in bar for this discharges him from the obligⁿ to acc^t on this plea however the Deft cannot go into the story of the acc^t.

3 M. G. 113.
Common Dig
sect 5
R. & R. 125.

If the defence shows that he was once accountable no plea in bar is suff^t except 'fully accounted,' a release or what amts to a release. All other defences must be pleaded before the auditors for if the Deft has once been liable to account & has not accounted & has not been released he clearly must be liable to account.

3 M. G. 73
113.4

The defences of 'fully accounted' & 'release &c' must be pleaded specially.

3 M. G. 113.4

(64)

Compt Dy

Art 11.

3 Mil 99.

117.

bro 84.

506. 1 Selwyn S.

The party may before the auditors join issue in law a fact it is said that the issue is then to be carried to the Ct & tried. It takes this rule to mean merely that every special issue must be taken back to the Court & pay.

In Cam the auditors try every issue of fact joined before them.

2 Day 118

bro 82.

3 Mil 114

Whatever has been pleaded in law is inadmissible before the auditors. Bro 82. 116. 3 Mil 73. 101. 113.

1 Rac 21. Ex Deft can not plead non bailiff or receiver. a release. plene computavit &c &c

And further the Deft cannot plead any thing contrary to what has been found on the first plea.

Contt 87 at 66

Compt Dy

C 11.

1 Roll 124

1 Ray 21

4 Co 544. y

Steu 610

But it is a good discharge for the Deft to show any thing wch could not have been pleaded in law & whch shows that the Deft ought not to be subjected to a recovery. Ex plea that the property committed to his charge was lost at sea without his fault. Indeed it is always good accounting to show that the property was lost by any inevitable accident without fault of Deft. This can be pleaded in bar of the action.

That the propy was perishable & that the Deft
therefore it being in danger of decay he sold 13ac21
it on credit & that the debt was a bad one, 20llo0100
is said to be a bad plea unless the Compt.
warrants sale on credit. But the rule of
now somewhat relaxed vide Master Serjt.

The allowance to a bailiff must be charged in the acc! before the auditors. *Ex parte 14 (a)*
Compt. Serjt.
Dec 12.

In C the fees of the auditors constitute a
part of the costs the auditors appt their
own fees & the amt is in the first instance
p^d to the auditors by the successful party.

An action of acc! may here be bro't before
a single justice but he can't appt auditors
he does his the business himself.

Where the just^{ice} is given in Cy B^o in award
of auditors then lies no appeal to sup^r Ct^y

(66)

3 Bt 437 In Engl? remedy is in Chy almost entirely
381.2 for Ct of law in Engl? cannot compel a
447 discovery on oath nor the production of
papers.
Wat 228 1 Bac 16

But in this state the action of acct is
frequently bot for one it has given
auditors the same power as a Ct of Chy
with respect to discovery upon oath & the pro-
duction of papers.

1 Bac 21 When the award is returned to the Ct the
party may object to the award & for
certain causes the Ct will set aside the
award & appt new auditors on the same

1 Root 268. If the auditors exceed their commission
413. so if they adopt a principle & misapply
it. so if the auditors mistake the law or
2 Day 116 given facts & this can be made to appear

so for misbehaviour bribery partiality.

But Ct do not direct auditors as they do
juries.

The mode of objecting to an award of auditors
is similar to that of a motion for new
trial or arrest of judgment after verdict.

But with us objections are taken by the
way of remonstrance but the Ct will not
in genl inquire into facts not appearing
on the face of the award

(67)

The Ct will inquire of facts extensive
only from the auditor themselves

Kil 353

1 Root 137

261:8

2 Day 116.

But when the objection is misbehavior to the
inquiry will be from third persons. —

Debt.

- 3 Bl 134. According to Blacke the legal acceptⁿ
 of the word debt is the sum of money
 due by express contract. But express is
 improper it sh^d be by certain contract
 for debt will lie on implied contract
 4 Co 44th if it is said not on implied contract for
 3 Bl 155. no fixed sum

However it seems that now debt will lie
 on an implied contract to pay an uncertain
 sum where the value can be ascertained. Et
 goods sold witht inquiring as to the price
 wth express promised to pay here debt
 will now lie 1. 4 Bl 550. 2 Bac 13. it debt

Arg^t C. Debt then will lie not only for a sum
 1 Bl 550 certain previously fixed but for a sum
 capable of being ascertained by reference
 to some standard.

Debt lies then in simple contract, specially
 just^d a recognizance at C L where the
 sum is either ascertained or capable of
 being ascertained. It also lies for the
 recovery of a penalty given by Stat.

Debt in simple contract has been discussed in
 3 Bl 155 Eng^l: 1st because wages of labour were allowed
 2nd In this action it was formerly held that
 4 Co 44th the Pl^t must recover the precise sum declared
 3 Bl 155. or a nothing. But now of late is no obstacle
 & the rule last mentioned is expended

now therefore debt in simple contract
is unimpaired & if late Debt in simple contract 2 B & N 1221
contract is not infrequent the assumpsit Devoe v. 7036
has become a favourite notion. 1 H B 249

582

2 B 219

But Debt will not lie at least by the ass't
at ag't an Ex'r in an exp'rep. simple contract Howe 182
made by the testator but the reason of the 140 200
rule viz that the Ex'r cannot raise his law Ch B 219
is now obsolete tho' the rule seems to remain 9 Co 87

60 C 135

187.

This action will lie ag't the maker of a 100 llo 238
promissory note for he is an exp'rep contract Ch B 221
to pay a certain sum.

But it seems to be a question whether
it will lie ag't the indorser but I think that it will not lie for the indorser the 60
is merely an insurer & in legal strictness indorser 100 llo 378
is not indebted 100 llo 378

312

Ch B 221.

Ex'r Dig 173.

1 H B 123

Ex'r Dig 173

If one expressly promises to pay a sum certain
for property &c. to his own use he debt will
lie ag't him but in general if he promises to
pay for property &c. to another he is not
liable in debt. but if his promise is original Ch B 220
debt will lie — a special action the
case must be bro't where the promise is
collateral. even gen'l indebitatus assumpsit will not lie 1 H. 193

Ex'r Dig 173

Again Debt will not lie vs the acceptor
 of a bill of exchange in favor of the payee
 talk 23. for as between the payee & acceptor the
 Ex Dig 173. acceptor undertakes to pay the debt of the
 1 Vent 152. drawer. the drawer is the debtor & he is
 12 Glos 341.8 liable in debt
 Ch B 220. Ch B 546:7 note seems contra

Sometimes debt lies where there is nothing in
 the nature of a contract between the parties
 7 R 756 to the suit I refer to the case of penal stats
 7 R 257 where the penalty is certain & is given to
 3 R 441. the informer or the party injured Debt is
 2 R 203. the proper action
 Conf 852
 1 R 595.

Debt thus lies & must be a civil action
 tho' the statute is criminal or penal
 the rules of evidence &c are the same as in
 other civil actions.

4 G 206. But this action never lies for the recovery of
 2 Bl C 468. damages. but after one has recovered damages
 1 R 600 he may have debt on the judgt

Eccl.

D. Bre 14.

2 Stra 428 Debt lies on an award of arbitrators to pay a
 sum certain.

4 Ann 243 But where the debt in a trust is the custody on
 Ex Dig 156. the judgt Debt will not lie upon it

1 R 557

3 R 25. 7 R 42. 10 R 133.

And if Debt in judgt has been discharged in
 ex^r on the judgt & is discharged from custody
 by the Pl^r's consent Debt will not lie on the
 Ex^r nor is there any remedy at all on the
judgt

5 M. & 13
 73 R. 421
 4 B. & 12

If goods to the amt^t of an Ex^r have been taken back
 apply it, debt will not lie on the judgt for
 with the Ex^r was taken out.

Collo 214
 1 Ke 6551

But when goods have been taken on Ex^r only suff^t Ex^r to
 satisfy part of the judgt. debt will lie on
 the judgt.

In the English practice Ex^r can not regularly issue
 on a judgt after a year & a day after judgt
 obtained after this time his only remedy is
 by Debt on judgt. & if he had taken out Ex^r
 & the Ex^r had gone out & the year & a day after
 judgt copied the was the same

Barth 30
 1 Sid 357

for the judgt is so far presumed to be satisfied
that Ex^r will not issue on motion after this time
 But by St Wisp 2^d the Pl^r may after the year &
 and a day have a scire facias ag^t the Debt
 & then if no cause is shown ag^t the Ex^r
 Ex^r will issue & here it is incumbent on the
Debt to show that the judgt has been satisfied

Ro/ 364
 Collo 283
 Barth 284

(16)

But when Ex^r has been suspended by writ of error &c the Deft may take out Ex^r by motion within a year & a day after the decision of the question in error.

It is generally believed here that Debt on judgt will not lie until after the year & day for before that time Ex^r may be taken out on motion - but this impression seems to be erroneous vide 1 R 337. Carth 30. 1 Nelson 626.

In C no time has been limited in which Ex^r may issue on motion. Our Ct have held that after the lapse of many years Ex^r shall not issue of course. It is supposed in C that Debt will not lie while Ex^r will issue on motion but it is very clear that when Ex^r will not issue on motion Debt will lie. Ex gr a Justice dies after judgt but before Ex^r Debt must lie on the judgt

In C as in Engl^d a scis fac will lie after the time of obtaining Ex^r by motion.

It is clear here that when the full benefit of the judgt cannot be obtained by taking out Ex^r Debt will lie a month after judgt is recovered. Ex judgt is recovered as an absconding debtor & foreign attachment is the only means of obtaining the debt.

Oct (182) (+ Settles 181)

(73)

So when judge is recovered in one state and all the property re of the debtor is in another state debt will immediately lie on the judge for here the ex^o on the judge is of no use. i.e. it will lie in the state where the property re of the debtor is. Kirt 77

And it was determined that if the Pl^f. wished to obtain interest on his judge he might have debt for that purpose in the judge at any time this seems inconsistent with the impression in this state that debt will not lie while ex^o can issue by motion. (It is now decided that debt will lie in a judge immediately after it is given. Conn^t. Repals 182425)

An erroneous judge will support an action of debt as well as a correct one for an erroneous judge is not void, merely voidable by act of error. 7 R.H. 8
3 M.S. 345.
5 Co 142 (Lat)

By Constitution of U.S. it is provided that full credit shall be given in each state Con. U.S. to the public acts records & judicial proceedings. 44.51.
& every other state. Congress may prescribe the manner of proof & the effects of the Acts of Conn^t have been uniform that if debt is bro't here on a judge of a foreign state the original cause of action cannot be enquired into & that the judge in that state is as conclusive as the judge of any own state. In other states it has been held that the judge of another state is of no more solemnity than a promissory note.

By the rule established in those states
 1 John R 426 the judge of another state may be
 5 John R 37 impeached the Deft may plead that the
 Caines R 400 judge's was obtained on a contract with
 7 Dallas 219 and usurious. &c. &c.
 158.

2 Bull 300

John 173

6.

15 John 121

4 Bing 686.

2 Penn 245

This was formerly the rule in New York but
 it is now held in that if the judge was
 recovered in another state & the Deft
 was summoned & appeared the verdict is
 conclusive. but if the judge was recovered
 without notice to the Deft no action
 whatever will lie, even if the cause of
 action can be shown to be complete.
 some cases have been decided in relation to
 this.

But it is decided now by the Supreme Ct
 of U.S. that the judge of any court of
 5 Wheat 411 any state has the same validity, force &
 effect if the judge is the state where it
 was rendered.

vide 5 East 475. 4 East 192. 3 Wils 247.

It was formerly supposed that debt w^d
not lie at all on a foreign judgt but
it is now settled that debt will lie on Engl.
a foreign judgt but that it has no more 24 B & C 410
validity than a simple contract but 5 East 475.
it is agreed that the foreign judgt
implies a consideration prima facie so
that the burden of proof lies on the
Deft to show the judgt to have been
wrongly obtained, either in law or fact
2 B & Mchall & Adelp 951. 3 Simons 458.

The rule that foreign judgts may be thus
impeached only applies to municipal
courts not to the prize courts the
records of prize courts are conclusive
every where.

In declaring on a foreign judgt the Plf
should not state the original cause of. Dougl
action he should merely count upon the record
sent & judgt for such a judgt per se
prima facie implies a right of action

The judgt of a municipal C. of a foreign
country is examinable here only when he
who claims the benefit of it applies to
our Cs to have the advantage of it.

But if a foreign judgt is pleaded in bar
it is as conclusive as a judgt of our own

24 B & C 410

Ray 473.

2 Shonk 232

Skin 59

(76)

Day 6 In declining on a foreign judge it is improper to count upon it as a record & to conclude from that fact per se as it is but if the declaration does so count it is merely surplusage.

And the true word is a *habeas*

Day 4: 6. Indeb. aumpact is concurrent with debt on a foreign judge & a foreign judge draws interest

It is said ^{as a rule only} that when indeb. aumpact will lie debt will also lie. but this is too broad. It would

2 Bun 1055 Indeb. paid by mistake. obtained by fraud
Day 6. by breach of trust. by the sale of another's property can be recov. by indeb. aumpact but not by debt.

1 H&L 550 this propⁿ applies only to express promises to pay money & to promises implied from an express contract as if make a contract for certain goods but say nothing about the price or about paying for them.

Banker 76 On a resp. judge debt will not lie nor will
78. any other action & judge understood
un 6762 by it with jurisdiction. judge obtained by fraud on the court

On a judgment obtained by process attachment
debt it seems will not lie either in one
state or in another for this judgment is considered
merely as a proceeding in law. this has
been decided in New York. 4th March 1808.

For money secured by bond a single bill
debt is the only C. & L. remedy. Cro. E. 44. 187
608. 2 Bac. 13. Exp. Dig. 198. So too debt lies
on a recognizance. On the recognizance of 24th Dec. 1791
special bail. In Court the usual mode
of suing on recognizance is by de fa:
for it is matter of record.

Debt appears to be the proper remedy
on a due bill. for it is an acknowledgment
in writing of an existing debt. Ex
Que. D. 100. C. & L. against Rowan gully
broc

of bond or other oblig^t payable gully with any particular
day of payment is payable immediately.

And in the case where the condition of the bond was that the bond sh^d be void if the debt should not pay. It was held that 'not' should be struck out. In precisely such a case viz that of a bond to appear in Court &c. one Ct held the bond to be void.

75 R. 124

200, 639

(78.)

When the condition of a bond is the performance of some collateral act the condition is Debt for the penalty.

2 Bac 13
Cap Dig 198
Bro & 444

In Debt on bond it has been held in some cases that damages may be had exceeding the penalty. This is deviating from the form of the instrument. The opinions are at variance but the later opinions are ag^t such recovery.
2 Barr 120
2228.
Doug 469.
25 R 388
2 Bound 106. 1 East 436. 3 East 604. 3 Bro Ch 489 Hyl. 25 L 490

4 Day 30 One Ct have held that damages exceeding the penalty may be recovered but they have held that interest may be computed on the penalty.

Sta 1089 On Cor^e to pay a sum certain or a sum capable of ascertainment Debt will lie.
1 Roll 541

Doug 367 If the condition of a bond is to, under a fair & just acc^t of money rec^d this condition binds to pay the balance as well as to render an account.
25 R 558

2 Atk 371 Where there is a cor^e with a penalty the cor^e Sta 533 may be in Cor^e broken or in debt or unrep.
2 P Wms 213 It appears that the cor^e was to have his Sta 525 election & then if he fails to perform Debt 1 Bro Ch 441 on the penalty only will lie

If a Sheriff collects money on an Ex^t & refuses to pay it over & it lies; for by liverying the money 24 B 650 the debt is transferred, by law, to the Sheriff. 206.

But debt will not be apt of suff. because he
has seized goods on Ex^{ts} where they remain
unsold, for want of purchasers; he is, then,
not debtor - he has no money belonging to
the debtor.

But if Shff sh^d return on ex^{ts} goods taken & estimate them in his return at a sum suff^t to pay the ex^{ts} & neglects to sell them it w^d seem that debt will lie ag^t the Shff here he ought not to be protected in saying that he has not rec^d the money when the fact of ^{not} receiving the money is the negligence of the Shff. 2 Samuel 24. 1075.

In C we resort in such cases to a special action on the case for neglect of duty.

If a shff seizes suff^t goods on ex^t to satisfy
the debt & they are rescued Debt li^s ag^t
the shff for rescue is no excuse -

(80)

Pleadings

In debt on simple contract almost any
thing may be given in evidence under the
Jalk 278 genl issue nil debit - & clear paym^t
LoRay 366 fit to s^c the st of limitation in the
Espdy 260 plea is in the present tense & if there
is a pay^t then truly nil debit -
It is not a plea of payment of the debt.

Detinue

This lies for the recovery of a specific personal chattel & in regard to its effect it is similar to a bill in equity as it gives specific relief. the judgt is however in the alternative that the Def shall deliver the specific article or its value.

Co Litt 186
3 Bl 152
Cr 361

In trover damages only are sought.

Detinue lies for the recovery of any personal chattel whh can be identified.

Comyn Dig
Det (4)
Co Litt 256.
1 Ryl 606.
Gr E 457.

Det lies only in such cases in whh the Def obtained possession lawfully. Comyn Dig Det (4)
2 Bac 457. 1 Roll 607.

This action has been clasped with actions sounding in tort but I think this incorrect. It lies only in resp of a impled contract.

Reens Hist
E 67.

for a C: in detinue may be joined in the same declaration with account in debt & there is no case in whh contract & tort can be joined in the same declaration. Indeed it is agreed that the genl nature of the action is the same as that of debt.

1 Bac 28.
4 Bac 11.
3 Bl 156.

(82)

Detinue will lie on a bailment not on a
1 Roll 606. mutuum for a mutuum is a loan of goods
2 Bac 47. not to be restored ~~is~~ but to be paid in
goods of the same kind.

Comyn Dig In general in all cases where detinue will ~~but~~
det(d) the proposition will not hold & converso.

This action has of late been disused on acct^s of
the vagueness of law & on acct^s of the great preciseness
10 Co 57(a) of description required for it was deemed
6 Cr 244 necessary to describe the article so precisely as
Yelv 178 that the ship might tell the article by the
1 New R 140 true description.
3 Mod 106.

2 Bac 115 Trover has taken its place wh^{ch} was given
10 Co 57(a) like the other case actions by West 2^d

Notice & Request

(83)

At & L in all actions on ^{whereby the terms of the contract it is to be performed or dam?} contract, a request is in theory always necessary. but in many cases the bringing of an action is sufft request. In other cases actual request before suit brot is necessary, & must be specially alleged, & proved. Coe E 148.
12 Mod 92. Ch Bills 133. 3 Salk 308. Conyn Dig Pled C 70. 110-11

Where the request is necessary only, in fiction the genl words 'tho' often requested &c "are sufft & this is not traversable. but where actual request is necessary, it must be alleged specially (with time & place genlly) & the request is traversable.

Notice is also sometimes necessary & sometimes not. Where it is necessary it must be specially alleged & proved.

Notice.

Previous actual notice may be made necessary by ^{the} terms or by the nature of the contract 14 East 500. 16 East 110. 1 Camp 425.

Where the fact or event upon which the right of action depends is up between the parties to the suit confined to the knowledge of the Def actual notice is necessary & must be specially alleged & proved. 140 P 319.
Hob 51. 68. (Exp Dig 131. NY C 250)
but where the Def can acquire the knowledge easily wthout recourse to the Def, notice is unnecessary.

(84)

For Examples vide Comyn Dig cond l. 8. Crof 432
1 Rol 463. Hard 42. 24210. 23720.

Ex promise to pay when Plf is 25 yrs of age
notice necessary (Comyn Dig notice 8. Cond l. 8.
Plea c 75). Crof 57. 24210.

To promise to acc^t before such auditors as
Plf shall app^t notice is necessary 1 Rol 462
Comyn Dig Plea c 78. 24210.

further examples Hob 68. 1 Buls 44. Crof 102. 228.
405. — Hob 14. 1 Rol 462. 2. 412L 315. (Ex p^o Dig
131 N & E 250) — Crof 492. 684. 133.
860. 92 (L) 40110 230.

Request

Where request is a condⁿ precedent it must be specially alleged & secus secus.

If Def^t agrees to do a collateral thing on request request must be alleged & q^uo
Betre a bond of c^om or demand -

Conjunctly
Plea 7.
Bond C10.16
Co C35.

But if Def^t promises to pay in money a debt 1 Ch R 323.
wh^{ch} he owes the Pl^f on demand or on request
demand is not necessary, for here the duty
exists independently of the promise But the
law never implies a duty to pay c^om & therefore
such duty never exists independently of the promi

So where one promises to pay a collateral sum 1 Ch R 323. 324.
of money & the debt of another on demand
demand must be proved 3 Salk 308. 1 Saund 32
2 Kel 126. Stra 88. Co J 153. 523. 639. Exp^d Dig
131. & 4 C 251.

So if Def^t promises to pay such sums on dem^d Conj^u Dig
as Pl^f shall pay on Def^t's acc^t special ^{action} request Plea 69
is necessary for the obligⁿ is produced by Co C 33. H.
the promise merely & it is part of the exp^d 91.
promise that there shall be a request

where the request is necessary it is traversable

Where the promise is to pay on demand in money what it was the duty of the debt to pay no special demand is necessary. for here the debt is the con' not the request. Ex Debt promising to pay the price of goods on demand - no demand is necessary the formal allegation (the other is) is suff^t 1 Wil's 33. Exp^d Dig 131 et 14 & 257. 1 John ca 319. & East 555.

In such cases the duty is precedent of the promise or independent of it & in all such cases no actual demand is necessary. 3 Salk 308. Cro & 74 3 Leon 200. Satch 93. 209. 1 Saund 32:3.

x If promises to pay his own debt on a given day or to pay double the sum on request. Now if an action is brot for double the sum a request must be specially alleged for a is bound to pay the double sum only by his exp^{res} promise & his exp^{res} promise is to pay on request. 1 Schob. 1 Saund 32. 2 Balb 229.

When a special notice or request is necessary it must in genl be alleged with time & place as all traversable facts must in genl be. Cro J 183. Cro E 15. Comyns 114 c 59.

But it is not necessary to allege with time & place if the action is such that the genl issue will involve a denial of the request for here the request is not distinctly traversable. He of bond conditioned to deliver. here the genl issue non est factum does not involve any denial of request.

But Ex. 2. In an action by the endorsee of a bill of exchange or by any holder is not yet an answer demand & notice are necessary but need not be alleged with time & place for the genl issue non asumpit denies notice (Ch)

Where notice a request is necessary if the fact is not alleged it is a fatal mistake not cured by verdict. Comyn Dig. 114 c 69. 3 Bulst 299. Jac 183. Cro E 74. 85. Long Curston & Astoral. (way 183 contra)

But the omission of 'time & place' in case of demand is cured by verdict even on plea by default. & the omission can be taken advantage of only by special demurrer. Selwyn 122. 10 East 359. (old opinions contra) -

(88)

Where special notice he is unnecessary, but is
alleged it is surplusage - need not be proved &
is not traversable. Talk Br. Earth 413. 1 Decr 174

3 Day 327.

Where there is a contract to do an act on request
& the contract is such that the Deft cannot
discharge him by tender without request then a
special request is necessary. Ex Dues 718 \$10 in goods
at my store here a tender cannot discharge
the merchant for the Deft has a right to elect

And if a time was fixed the rule is the same
Ex Dues on the 1st of Jan^y next &c. this rule has
never been established by authority but principle
warrants the rule for an analogous case 3 talk 308.

In how ^{the first of} these cases vary from the cases (ante)
to do a collateral thing \$10 worth of goods - \$10
worth of iron, 1 cent of iron. - the promise is not to
pay money but to pay a collateral thing & money
is used as the measure.

In the such case sh^d not the Deft declare that he
selected goods vide Selwyn 123. Decr 77. -

Assumpsit (101).

(89)

3 Bl 158. 1 Selwyn 523 for definition — this action was founded on the equity of West 2^d & was not known at C & 18th C only three actions sounding in contract were known Debt, covenant & account 202. 243. 391. I think also detinue.

All contracts not under seal are parol

77 R 357 (61)
1 Selw 53

On contract by deed this action will not lie bro 117 494, 605. Bro 576. Exp Dig 198. 2

The contracts upon which this action lies are express or implied. when the promise is implied it is not actually made but raised by law 1 Selw 53.

When the promise is implied it is always raised by some actual debt or duty which in pleading is alleged as the consideration of the implied promise. Key apert
Ch. Keate

But the law will imply a promise from indebtedness & from duty but it will never imply a consideration from an express promise & hence this action will not lie upon a promise even in writing without actual consideration.

55 R 582
77 R 357 (61)
2 John 237. 8
1 Selw 53.

Rule modified by law merchant between indorser & drawer when the action may lie without consideration vide Bill of Exchange —

The action on an implied promise is called an Exp. Dig. 1. indeb. assumpsit. this action of indeb. assumpsit is very like the action of debt in substance but unlike in form

Comp 289
7TR351 (w)
Edl 131.
Ballan 220.

The promise the implied is always stated in the declaration precisely as an express promise, so if the deft denies in indeb: a promise he denies to an express promise the Ct treat must treat it as an express promise indeed in pleadg there is no such thing as an implied promise and further if deft denies to a debt in a promise in a case where writing is the necessary evidence of the promise, he admits not only an express promise but one in writing.

2 Lam 1012
3 Lam 1357.4
4 Lam 1596.
Comp 116.
740.7.
2TR370.
Esp Dig 1.

The action of a promise like all the actions of trespass for the case is an equitable action, & in quiet lies to recover money due from the principle of natural justice the deft ought to refund or to pay

(22)
3BLR 524.

Any equitable defence is in quiet suffice in this action. If then it is not agt conscience for the deft to retain or refuse to pay the money due for he is in quiet not liable in this action.

Hence he who has paid a debt of honor of conscience of gratitake cannot recover it back. Ex pay of a debt barred by the stat limitations.

This rule however applies more particularly to indeb: a promise, than to special a promise for the law will not imply a hard contract to be.

And: Bumpst.
When will it lie?

Is it when one person has no money belonging to another, which he has no legal or equitable right to retain?

" " " " for money had & rec?
It is recover back money paid by mistake 17 R 255.
Ex by mistake in computation the debtor Comp 555.
pays double what is due to his cred. Doug 670.
H. R 553. 5 R 1454. 5 R 2639. 637.
In such cases the debt is deemed to have 2 R 1010
in the money to the use of the Def. Exp. Dig 2.

Money paid in fact

III If one person has obtained money from another by fraud ^{or misrepresentation} this action will lie to recover the money back.
Ex. insurer pays for a loss, & afterwards finds that a warranty is broken 7 R 415
17 R 343. Exp. Dig 2.

Stea 915
Doug 671
Comp 112
743.
4 R 415
Exp. Dig
4 R 14
2 R 1010
Peak R 111
2 R 225.
Talk 28
Exp. Dig 2.
17 R 255
12 R 274
Doug 637.

If a man pays money ^{through mistake or for some matter of fact} when he supposes it due, when it turns out that nothing is due he may recover it back.

And it has been held that when one paid in full a debt due to a bankrupt when he held a debt of the bankrupt which he neglected to set off, he was held entitled to recover - the trust being on a mistake in law.
2 R 1217
Exp. Dig 2

If one with a full knowledge of the facts pays over money to another, the party paying cannot recover back the money on the ground that he laboured under a mistake in law.

Unless it is against conscience for the ^{debt} holder to retain it. 1 R 206
2 R 825. 2 R 1012. Comyn's contract 326-340

allow had + us?

(92) Where money has been paid by mistake
Partly on the part of the Def it makes no difference
Ex 2081 whether the debt was paid by mistake or fraud.
Ex 2081

27 R 648

Ex 2081

But money paid by one to another the latter has
no claim & although he clearly ought not to keep
it cannot be recovered back in all cases.

Ex money paid by rule of Ct for to recover the
w: be collaterally to impeach the record

3 Bun 1354

Ex 2081

(N 25. 13)

If the acceptor of a bill of exchange which is forged
pays it to a bona fide holder for value he
cannot recover it back. the acceptor has
here given a sanction to the bill by putting
his name upon it & the bona fide holder
might have used it entirely on the credit of
the acceptor.

2 East 409

1 B & P 200

2 R & R 124

4 Ex 221

1 Ex 229

2 D 723

17 R 65.

And if one voluntarily pays money with a full
knowledge of the facts which make him pro
paying & with full means of knowledge he
can never recover it back - voluntary fit
injuria. Ex 2081 pass, knowing that a
warranty was broken or having the means
of knowledge - here the insurer knew the
facts tho he was undoubtedly ignorant of the
law but ignorance of the law will no more
excuse a man to an action than excuse
him when he is deaf.

When a party pays a debt, protesting that money had &c. (93.)
he is not bound to pay, declaring that
he is not prejudiced his rights and that
he is not sure for it still he cannot recover 18 p R 14
This supposes that the suit is commenced 279.
for a debt under a claim that something 2 Ex R 546.
is due. Pak Cr 35.
Exp Dig 1196.

for him money is p. with full knowledge
that he was not bound to pay, it. volenti
non fit injuria -

Rule w. be the same if the money was p.
before suit bro't I think that the reason
given by 20 Kenyon is incorrect. same reason
is adopted by Phillips. Phillis confirmed 9 Bing 346.

Money paid by mistake to agents &c.
If an agent obtains money tortiously, Conf 132
under pretence of authority from his principal 204.
but actually for himself, estoppel lies ag^t the agent at all events even tho' the
money is paid over - 43 R 485.
This rule holds tho' the agent be a known 3 Ex R 231.
agent. Exp Dig 5.
New 317.

(94) II. If an agent obtains money actually for his principal but obtains it by fraud, violence or the agent is liable. After he has paid over the money to the principal he has been guilty of a wrong. the right of action is complete as soon as the pay is made & he cannot by his own act destroy this right.

III. If an agent receives money, bona fide for his principal but without right he is liable provided he was not a known agent & provided he has not made pay to his principal.

By a known agent is meant one whose principal is known.

This rule supposes notice before action but as in all other cases of money paid by mistake.

but if the party claiming has made his claim before the money is paid & the agent does pay it over even before action not yet he is liable for he became in fault from the time demand made

The principle here is that

IV. If an agent acting bona fide & receiving money under a mistake is a known agent & the money is paid to him as to a known agent he is not liable whether the money is paid over to the principal or not, for here the money is in his hands to the principal & the agent is, in no fault, & the person paying has not remedy ag^t the principal.

20 May 1210. 1211. (entire vol 27) the 450.

allong and true
(95)

In Sta 450 the rule seems to be contrary to the rule here expressed. but it is obvious that the Judge there speaks of a case in which the agent did not receive the money bona fide if it was not bona fide it is contrary to the amount of the authorities and is only a statement Cary & Webster Sta 450.

V. It seems that tho the agent is not a Coups 505.
known agent yet if he acted fairly & Exp Dig 210.
paid the money over before demand made
upon him he is not liable

Where an agent only authorized receives money
for his principal which cannot be in conscience
retained the principal is liable whether the Sta 410
money is paid over or not or whether the 1 Camp 337.
agent is liable or not. for here the pay^r Exp Dig 110.
is deemed to be made to the principal

Money had rec?

(96.) Indeb: aumpset for money, had rec? ^{when}
the consideration for which the money is p^d fails.

Exp^d 2

197.

The failure consists in not receiving the stipulated consideration not in the want of value in the consideration.

15R 32

It lies to recover money p^d for an annuity, when the deed of annuity is void for want of formality.

25R 386

2Exp^d 839

4Exp^d 196.

3East 16. 6East 241. Exp^d Dig 2 (47)

15R 309

3Exp^d 102

261.

Exp^d Dig (3)

But in such case the money cannot be recovered back unless the grant has been set aside or unless the grantor is unwilling to make an effectual deed a refusal to pay the annuity as it becomes due.

3John 340

Exp^d 102

3Bam's adoff^{the}

445

entia.

to the P^l - 4Camp 341. 4ell + 137.

15R 150

Exp^d Dig (9)

3BTP 162

51Dun 2639.

2Jay 437

67R 666

5John R 85.

1Exp^d 268

Exp^d Dig (11)

2Exp^d Dig (2)

11Exp^d R 221.

11Exp^d P 306

320246

But if one pays in advance with full knowledge of the circumstances of the property he is a trustee of full knowledge he cannot recover it.

Exp^d Dig (512).

4Exp^d R 221.

17R 05.

2Exp^d R 713.

And where money is advanced by one for
a future act to be done by another & the
latter disables himself from performing the
action his immediately.

slight rule & c^o
(97)
2 Ex 1 R 522
1 a 480
5 Co 21.

Again Indeb fa money h^o rec^o lies fa the
recovery of money p^o under a void authority or
rather rec^o under a void authority Ex fa q^o 1 R 39
p^ona of d^o & the money may in this case
be recovered from the debtor by the creditor & the
debtor may sue the receiver (10 R 742) (12) (13, 14)
37 R 127

But where a person claiming a debt however
unjustly obtains it under the authority of a Co
of competent jurisdiction it can never be recovered
back - Or where it has been recovered by an
award of arbitrators in fac. Ex Dis 16:9 1 Day 130
2 H R L 416. If the judgment is set aside in any way the
party who p^o the money under it may recover it back 2 Ban 1004 Ex Dis 6 (16).

33 R 125
3 Ban 1984.
Comp 385.
33 R 269.

Again It lies to recover money obtained by
extortion, oppression, imposition or any undue
advantage taken of another's situation. Ex fa q^o 1 R 415
states more than principal & interest as the cond^o
of delivering the pledge the excep^o may be rec^o. 793.
this is oppression Ex Dis 4.5 (14).

2 Ban 1012
Strag 15
41 R 415
Comp 182
793.
Day 676.

And where money is obtained by unfair or fraud
ulent means even where the person obtaining
had a right to the money (if as the rule says
the question is not of Co jurisdiction) But I
imagine that this qualification is not necessary

1 Camp 179
Ex Dis 15.

money had rec^d.

(96) Deb. a promissory for money had rec^d when
the consideration for which the money is p^d fails.

Exp^d 2

179.

The failure consists in not receiving the stipulated consideration not in the want of value in the consideration.

15 R 32 It lies to recover money p^d for an annuity, when
2 R 366 the deed of annuity is void for want of formality.

2 Exp^d 839

4 Exp^d 190.

3 East 16. 6 East 241. Exp^d Dig 2 (47)

But in such case the money cannot be recovered
1 Exp^d R 309 back unless the grant has been set aside or
3 East 102 unless the grantor is unwilling to make an
261. effectual deed or refuses to pay the annuity as
Exp^d Dig (3) it becomes due.

3 John 340 If one has p^d in advance the freight 40. 85 &
Exp^d (9). the goods are not carried he can recover back
3 Bann & Adoff the money thus paid unless the failure is imputable
445. to the P^d - 4 Camp 341. 4 Ell & 137.

16 Exp^d R 150 Also for money p^d in advance for property when
Exp^d Dig (9). the vendor refuses to grant a conveyance or when
3 B & P 162 the property is essentially different from the description
5 Bann 2634. given by the vendor. Or if the vendor has no
2 Day 437 title P^d & P^d (94.)

67 R 666 5 John 85.

Exp^d 268 Exp^d Dig (1). 2 Exp^d Dig (2). 40 Exp^d R 221. 1 B & P 32046
But if one pays in advance with full knowledge
of the circumstances of the property he cannot recover it
means of full knowledge he cannot recover it
Exp^d Dig (512). 4 Exp^d R 221. 17 R 85. 2 Exp^d R 713.

And where money is advanced by one for
a future act to be done by another & the
latter disabls himself from performing the
action his immediately.

Sligher & Co

(97)

25/1/1822

1 u 480

5 Co. 21.

Again Indeb fa money how? lies fa the
recovery of money p? under a void authority or
rather no? under a void authority Ex page 1 R 59
p. 11 of ittlly & the money may in this case
be recovered from the debtor by the creditor & the
debtor may sue the receiver (1807 742) (12) (13 14) 37 R 127

But where a person claiming a debt however
unjustly obtains it under the authority of a
competent jurisdiction it can never be recovered
back - Or where it has been recovered by an
award of arbitrators in force. Ex Dis 1639 Day 130
2 H R 416. If the judgment is set aside in any way the
party who p. the money under it may recover it back 2 Ban 1009 Ex 126 (16).

35 R 125

Ray 1211.

3 Ban 1894.

Comp 585.

72 R 269.

Again It lies to recover money obtained by
extortion oppression imposition or any undue
advantage taken of another's situation. Ex p. 11
it may be more than principal & interest as the court
of Chancery in the p. 11 the excep may be recover? 793.
this is oppression Ex 126 (14).

Long 671.

And where money is obtained by unfair or fraud
ulent means even where the person obtaining
had a right to the money (if as the rule says
the question is not of Chancery jurisdiction) But I
imagine that this qualification is not necessary

1 Camp 129

Ex 15.

Money had recd?

(98.) When money was recd under a warrant of an
Ball 136. 419 inferior court & the warrant was quashed, this
Exp & Dig 161 action was supported for the recovery of the money.

But where judgment is reversed on writ of error the money
may be recovered in the writ of error & this is the
usual mode, in Court this is the more simple mode
but still ^{in Court} the money may be recovered in a writ.
2 Bull 1004 In Ellows & Holt Earlard & had sued B in an inferior
Co & recovered B brot an action to recover back the
2 H R 416. money wth the judgment on the ground that B's
7 R 269. defence of B was not cognizable by the inferior
Exp & Dig 162 Court & on this ground the Co of B R gave judgment in
favour of B for the defence was a good one in Co
of C & tho not cognizable in the inf. court.

If money p^d on a judgment after reversed has passed
2 Day 152 to a third person ^{bona fide} it cannot be recovered from the
Exp & Dig 191 third person. Ex judgment was p^d to an atty who
retained the money for a debt due from the Co.
judgment was reversed & an action brot agt the atty.
it was held that the action w^{as} not lie

Bull 130 Again In: ap: for money brot agt his to recover
1 E R 172 money imbezzled - Ex elect imbezzles the money of
Exp & Dig 171 of his employer and in such case it has been
Peak R 223. held that infancy is no defence for tho' the
Doranch 226. action sounds in contract yet in fact the
cause of action is a tort (1 E R 172 Peak R 223 S.C
Exp & Dig 17. 18.). If the money was d^d into the hands
of the infant by the Pl^{ff} this action cannot lie
for then it is d^d on a contract of bailment
It

It will not lie agt him unless the ^{Money has been} taking (99)
was wrongful here it is undoubtedly a
tort - for an analogous case vide 8 R 335.

✓ So too money may be recovered from A to whom the agent has p^d the money ^{but principal} Exp 147
was rec^d male fide. Ex agent loses the Exp 75
money of the principal at gaming the prin- Exp 84
cipal can bring ind. up: for money he has rec^d 14915.
the money: & thus recover the money he has rec^d Exp 11

✓ But person who has p^d money on an illegal contract may recover it back unless the pl Exp 1073.
is particeps criminis. 1. H. B. 85.

✓ Where money has been p^d as interest but exceeding the legal rate of interest the recp Strat 15
may be recovered back Exp 638.
Exp 14920

✓ But where money has been p^d on a contract & the party paying is deemed particeps crimⁱ: Exp 1497
he cannot recover it back (20.1.181)
Exp 792
Exp 1757
1. B. 6201.

And the same rule holds when the contract was made in another state & in violation of the laws of the state in which it was made for as to the obligation to lex loci governs.

Rough had tree?

100. ✓ But if the illegal act is as to the illegal
Dong 451 transaction & the money is p.^d it may
or 470 be recovered before the illegal act is done.
Marsh. on the 11. Plf in part with coming

552.

1 Poulc 200. Bull & P 131:2 Salk 22. 57 R 575 Conf 111 124112

Dong 470 ✓ But if the illegal act is executed & both
1344 467 parties are in pari delicto & the money is
Exp^d Dig 22. p.^d it cannot be recovered back

47 R 561.

27 R 535.

✓ Where money is deposited with a stake holder on an
Exp^d Dig 7. (19) illegal wager has been p.^d over to the winner after
(22) 556 the event decided & with the consent of the loser it
57 R 575. cannot be recovered back from the winner (but
1844 298. seems that the rule is the same tho' the money
Dong 696 be p.^d with the consent of the loser after the event.)
4 John 426. but I think this incorrect for it seems that the
Exp^d Dig (25) winner cannot recover from the stake holder.
Park on 80. Marshall on 42.

57 R 405. But if the stake holder pays over after being prohibited
Exp^d Dig 19. by the loser and after an action bro't agt the
(53) (25) stake holder it can be recovered from him.
3 East 222. Or if he pays over after being prohibited tho'
(4 John 426) an action has not bro't before money p.^d the
rule appears to be the same 3 East 222. Exp^d (24)

57 R 405 ✓ It has also been held that where money is deposited
3 East 222 &c on an illegal wager either party may recover
8 East 288 his own deposit agt the stake holder -
7 East 535.
Exp^d (161) (4 John 426 denied & Exp^d Dig (25. 53).)

Money had & rec^d

(101)

But I think the rule perfectly correct. the money is merely stopped in transitu no equity in the law to keep the money

And it has been decided that money thus deposited 3 East 222 may ^{be} stopped the money at any time in transitu 24

And it was once held that money p^d to the party before the event might after the event recover 7. R 535 back the money from the assignee. but this is ag^t the current & authority 1 East 48. 15 R 575
In 7 R it is said that the case in 7 R is not correctly reported & that the action in that case was ag^t the stake holder

If one has paid money to a third person on an illegal contract for the use of the other party 11 R 403. the latter may recover it ^{from} him the paying 296.
one does not depend upon any contingency 24
the money is p^d to the third person as a carrier or bailee to be p^d absolutely to the other party. & the carrier has no equity to hold it for if one of the parties elects to pay it the carrier & no third person can prevent & interfere -

But in such a case the party paying the money may recall the authority at any time before the money is p^d over 3 East 222
~~there is~~

Money paid to ~~another~~ (agent) to be applied to a particular purpose as to purchase an estate &c, if not applied, may be recovered back as money had & rec^d Comyn's Contracts, 270 -

If one takes the property of another & sells & converts it into money this action will in general lie 8 Taunt. 688. Comyn's Contracts, 276

When a claim to money is given by law the action of assumpsit lies to obtain the money & if the debt is bound to pay money by a bye law but the declaration must here be special 2 Lev 232. Esp & L. (25).

But this action will not lie for a penalty given by a Statute for debt is the higher remedy.

+ Again A. lies to recover for office &c given by law. Ex attys fees. 2 Stra 747. Salk 330 60 R 682. Pak R 182. Esp & Dig 6 (16). 1807
So it lies to recover tolls or duties allowed by law. Turnpike toll Bridge toll &c 3 Burr 1408. 1 Bl R 413. 2 Bl R 764. Esp & Dig (30).

Money paid out & expended for the use of the deft.

1 Burr 373
Esp & L
(31.33)

Where one has laid out money for the use of another at the latter's request express or implied the law raises a promise to pay & this action lies to recover the money. Ex of pays B's debt at B's request (even tho' the debt was created by an illegal contract between B & C the action will still lie for it is not participi criminis - so if B owes C an unsecured debt for it has no concern with the illegality of the transaction. It is precisely as if it had lent the money to B to pay the debt indeed it is a loan in substance 2 Will 309. 10 Mod 139. Esp & Dig 12. 31. 33).

Money paid & out & expended.

If one of two joint debtors pays the whole debt he may recover half from the other in this action
 3 B & P 225
 5 Ex 194
 25 R 282
 57 R 116

This rule however does not obtain between joint wrong doers if one of the wrong doers pays the whole damage he can recover nothing from the other the law implies no promise of indemnity between joint wrong doers.
 57 R 116

It is indispensable that the money sh^d be paid at the express or implied request of the debt. for it is a general rule that no person can by paying another's debt without the consent of the latter maintain an action ag^t him.
 15 R 310
 613
 1 Ex 131

But one exception by the law merchant as where a man stranger after protest for non acceptance accepts for the honor of the drawer or where such stranger pays after protest for non pay^t See 3 B. vide "Bills of Exchange"
 But if one is compelled by process of law to pay money for another except in case of tort the law implies a request & he can recover
 27 R 104
 If A's goods being in B's possession are detained by B's landlord & he is obliged to pay rent to recover his goods,
 15 R 264
 15 R 318
 86 (176)
 35 R 8.
 57 R 308.

And indeed where one is compelled or compelled by law to pay another's debt this action will lie or pay^t. & surely pay without being compelled by law is pay voluntarily
 Comp 525.
 25 R 104
 1 Ex 10.
 10. 31. 100

Money paid laid out & expended.

1044p 134 And where a surety pays an usurious debt the
 Exp D 133, rule is the same. even tho the surety knows
 of the usury.

§ Again it has been held that when the surety
 2 Mc 14 does not actually pay but gives his promissory
 2 Exp R 571, note with the promise receives the note as
 544p 244 pay^t he may have a subrogatⁿ agt the principal
 Exp D 10 § But it has since been held that tho the
 (32) 53 surety gives his bond & extinguishes the debt
 1 H B C 239 of the principal yet he cannot maintain
 544p 26. this action agt the principal 3 East 169.
 1 John 156 (2a) 2 Barre 56. 3 John 202. 5 Exp R 1. Exp D (32). the
 2 Comyn. c. 136 it do not here pretend to deny the former rule
 11 John 573. tho they disapprove of it.

§ I do not approve of the latter rule for they is
 a liberal action

1 Ld R 340 § But it is o^r that in such the surety may maintain
 2 Ld 17 a special action on the case agt the debtor for not
 indemnifying him. but such an action has never
 been bro't

§ If one of two sureties becomes such at the request
 2 Exp R 476. of the other the latter having p^d the whole debt
 Exp D 33. cannot compel the other to contribute he has
 no equity agt the other as between the two
 the person requesting is. as a principal

But in the case in 2 Exp the surety who paid had security
 for the debt from the principal & is not this fact the principal
 ground of the determination.

Assumpsit (4.2).

(105)

Money paid out & expended

If one of the principals in a bond to with
sureties procures a stranger to pay the debt 4 Feb 176
I'd may maintain this action agt any of the principals
the principals get not agt the sureties

2 Count R 23
Hobbs 1763
Baldwin 1763
Hobbs 537.

the action of implied assumpsit may arise out of an
express contract (the when the action is b'ot on the express
contract the action is special assumpsit)

Ex from contract of sale, warranty of good title is implied & again where there is fraud in the quality
of an article sold here implied assumpsit may
be b'ot for the recovery of the money i.e. -
vide terrapin on case -

x But if an attitled contract, to sell property, &
acquires title before the sale the purchase money p.
at the time of the contract cannot be recovered
back on the ground of the seller's want of title
at the time of contract made -

When py is sold by an auctioneer & he receives the
purchase money payt over is no defence in the action
he is regarded as a state holder who must not
part with the purchase money until the sale is
complete. But when the sale is by an auctioneer
& the vendee sues for non performance of the agreement
the action sh^d be agt the principal unless the
auctioneer refuses to give the name of his principal
& then agt the auctioneer. In the former case the

action is b'ot to recover back the money p. in
disaffirmance of the contract & the auctioneer
is treated as a mere bailee but in the latter case in law the contract is with prin

St Dig 11/354
Burr 1639
17 John R 274
6 John 5

15 John R 184
17 John R 202
17 John R 35.6
40 John R 221

Burr 1629
17 John R 35
17 John R 120
17 John R 133
2 HBL 573
Doug 23
1 HBL 17
Comp 818

Goods sold and delivered, to whom the price of property is paid

x Any willful concealment of the defects of an article sold (when latent) is a fraud for which
 Pak R 115. a special action on the case ex detico or
 Pak R 229. he may bring a pumpit on the implied
 Ep L 40/ warranty. 642 679.32 warranty.

2 Day 128

1 Sha 407 x On any contract of sale where the money is paid & the
 2 Bl C 448. vendor does not deliver the property the vendee may
 Ep L 13:14 bring quill under a pumpit for money he has paid &
 (41) he may sue for damages for the breach of
 the contract in affirmance of the contract

18 p R 430 When the vendor gives credit for goods sold he
 Ep L 48. cannot in quill sue for the price until the
 time of credit has expired

But if the credit was obtained by fraud this rule
 18 p R 430 does not hold & an action may immediately
 2 L C 532. bring an action ^{be had} Ex: one claiming certain property
 6 John 110 obtains credit & it is discovered that he does
 not own the property. or one obtains credit with
 the fraudulent view of absconding with his property
 for the fraud avoids the agreement to give credit
 & the contract remains as if no time of credit
 was given. or if one who has no property personates
 a man of property & obtains credit for six months
 the vendor on discovering the fraud may immediately
 bring an action for the goods price of the goods

It is common to purchase goods & pay for them
 in bills now on a contract to pay for goods
 in three months in bills of two months if
 at the end of three months the bills of two
 months are not d^d the venditor can't sue. Esp D 49.
 for the price of the goods for the term of
 credit is five months but a special apump. 1 CR 330
 may be had for not delivering the bills. Esp D (49)
 at the end of three months and at the end of five
 of five months he may bring indebitur apump. 4 Cr 51
 for the price of the goods. (2 Stark 227 contra 1 Cr 609
 & 2 Comyn C 228. 2 Comyn C 228.

Where a venditor agrees to accept the security of a
 third person & he becomes bankrupt before delivery
 the venditor is not bound to deliver the goods for
 such security, unless there is an express agreement
 that the venditor shall take the risk. 2 Cairns 117
 4 Ellap 405
 Esp Dig (49).

If on a complete contract of sale the venditor
 refuses to accept the goods & pay for them the
 venditor may sell the goods & recover the difference
 of the first venditor if the goods are sold at a price
 less than what was agreed upon by the first venditor.
 Contra 3 Camp 426. (4 John R 316). 2 Kent 397.

On a sale of goods not actually d^d the action
 is not for the price s^d not be for goods sold
 & d^d but for goods bargained & sold tho'
 a symbolical delivery warrants the first form
 of action. but in such case the recovery vests
 the title absolutely in the venditor. 4 Cr 251.
 Esp D 50. (and he may have time for them). 13 B 16. Esp Dig (50).
 2 RLE 445.
 2 Comyn C 231.2

In an agreement for the purchase of an estate the vendor is not bound to accept a conveyance by atty. & notwithstanding an offer to convey by atty. the vendor may sue for non-performance of the contract for the house of atty. may be forged to & the vendor is not bound to assume this risk. & besides this mode makes his evidence of title more complex.

For Wages vide 'Contracts'

To recover from a loser money won in a lawful wager the action must be a special assumpsit: 20 Ray 69. Carth 338. 33 R 704. Exp 556.

Use & occupation under 11 Ge 2^d vide 'Contracts'

15 R 13 This action will not lie where the letting was for any unlawful purpose. as for smuggling where the purpose was known to him who lets - before 1800 from common law.

5 R 4 This action lies in favour of tenant at will who has underlet. & in favour of tenant from year to year & the rule is good where the lessor has engaged the property by the permission of the lessor he cannot question the lessor's title.

11 Ann 576. It is a transitory action & therefore the place need not be stated & if stated wrongly 20 Ann 374 the lessor may recover unless it appears that the lessor was misled by it - the reason why transitory is that lessor cannot deny the lessor's title -

Ass. for work & labor done -

money lent -

on acct. of bills -

For a pump: on bills of exchange & policies of insurance & etc. bills of exchange &c.

(109)

Where there is no express promise & where the facts exclude a presumption which might found an implied one no form of a pump: can be maintained (176).
nor any other action.

17R20

Bullet P130

16P2309

6 East 392

85R610

Hence the action will not lie for a mere voluntary courtesy. A voluntary act is defined to be an act done by one for the benefit of another with the certainty of recompense. But I think that it involves any case in which the act done is not done by the request of the deft express or implied.

But the case is otherwise when services are done at the request of the deft for this is not a voluntary courtesy. Hob 10. 105. Exp 2 55. 178.

But it is so? that in giving any thing done in the regular course of the Plf's employment is not a voluntary courtesy. Ex Com: carrier finds my bundle in N.Y. & brings them home to me. Exp Dig (178) 55.

Comyn Conz
2v p 57 (178)
Brook 2504

This rule however is too broad. Ex Shoemaker makes me a pair of shoes when he happens to see me barefoot. or a blacksmith finds my horse unshod & shoes him.

Bull AP 10 For illegal consil-^{ide} cartivety that must be
 Esp D 88.9

175: 9.

Exp R 13 This action will not lie in contract of an
 Esp D 11.2 immoral transaction. Ex B. Knice sells indent
 camp 248. permits 248. 11.2
 MP 140

no Esp 4

Exp 11.2

One when the consil of an intin contract is
 in part illegal there can be no recovery for any
 part. But if the agent were they for \$1000
 borrowed & promise to pay \$1000 for something
 illegal \$1000 more I can receive the first \$1000

Rak R 144

82 R 71

Exp 11.2

When one has been compelled in consequence of his own
 breach of duty to pay the debt of another he can never
 recover the money for by a wrong no man can acquire
 a right or shift permits a voluntary escape

2 Bur 924

30 R 103

Rak R 72

Exp 11.2

An action never lies on a promise to pay a person
 for doing that which it was his duty to do without
 reward or a person entitled to such without reward
 to shift promise the shift money for bail. for it
 is extortion.

Long 431

37 R 557

45 R 166.

6 Do 146.

4 case 72

No will it lie on a promise made to defraud
 third persons

Again *assumpsit* will never lie in a specialty, the action must be founded on the deed. the simple contract is merged in *assumpsit*. 2 Stra 107. Esp & 96. 187. 6 Co 45. 1 Poul 219. 423. Esp & 164.

And a promise by debt in a *judgt* to pay the *judgt* in *consid* of *fraud* will not maintain *assumpsit* for any action the *judgt* affords the higher remedy. *oblique* promises to pay a bond. *Idem* *ut* 2 Comp in 337 or 482 in *Brookfield* *Chit* 1123. (Com. Dig tit action of *assumpsit* (C.)) But a promise by *st* in *consid* of *fraud* to pay a *judgt* agt B or a bond by B binds *st* for agt him there is no higher remedy.

* The real action for money had & received will not lie if the claim depends on a question of right not *fring* *cond* 418 treatable in that form of action. Ex there is a warranty of soundness. *indeb* *assumpsit* will not lie to *strag* recover the price for the action is not adapted. Esp & 98 to the trial of the question of warranty. the 194 action must be on the special case.

17 R 133-6.

Long 23.

2 R 181.

East 444.

7 East 274.

Linn 35.

* But it is now held to the contrary in the case of warranty. *vide* *trespass* on the case of no notice is taken of.

3 Esp 13

1 Sch 688 (a)

The action for money had & rec^d? lies only for
 5 Burr 259 money. It will not lie for stock in the funds
 2 B & R 684 (nor even for bank notes) for most purposes bank
 Esp & 29 bills are regarded as money.
 194. the reason appears to be that this
 form was devised for the recovery of more money.

Where goods are to be d^d at a given time the seller
 75 R 151. delivers part before the time he cannot maintain
 39 Wm 534 an action for the price of the part d^d before
 2 C & R 66. the given time. Nor can he ever recover for
 3 Bul 325. that part d^d unless the vendor expressly agrees
 Esp D 159. or impliedly to accept the part for the
 1247/ whole, unless the other part is d^d at the time
 agreed upon.

1 Camp 113 On a purchase of goods by sample if the bulk
 Esp D 248. does not equal the sample the vendee is not
 32 W 311 bound to accept (or having accepted is not bound
 5 B & R 202 to pay for them even tho' there be no fraud in
 the vendor).

And in such case if the price is p^d in advance
 it may be recovered back. (unless sample implies
 a warranty that the bulk is equal to the sample -

Hearings

where the agreement between the parties is special the Plf sh^d declare on the special Bond 24 contract that the debt need not be 17R 134 surprised. Bull 139 Ex D 130 249

But a quit count, upon an implied promise may be joined in the same declaration with the special count. this may be done when Bond 628 both counts are for the same claim or where Bull 139. they are for diff^t claims but on the face of the declaration the diff^t counts appear 1 Bos 354 to be for diff^t claims. Ex D 140

Ex Debt may be sued on a note & 265 a declaration added for goods sold &c. the object is that if the debt fails to prove a subsisting special agreement he may go into evidence upon the quit counts. So if makes a special agreement concerning the Bull 139 building of a house & afterwards altering &c. &c. R 355 he are made Now if the Plf cannot recover 65R 320 on the special agreement because he has not 3 Do 412 performed according to the original agreement 444 he may recover for work done & the Ex D 140 original agreement may furnish evidence 265 of the price. 1 Klu 83

On the other hand where there is a special Bull 139 & quit count & the Plf proves a special agreement 1 Klu 50 still subsisting & unaltered but diff^t from that which 638. alleged he cannot recover on either count 725. he must bring a new action. 1 Klu R 354.

1 Wils 117. Ex Dig NY 264.5. 3 Ban 1525. 2 Do 1011.

Pleadings

If however a special agreement is proved but
 77R 151. one in which the Plf cannot recover as if it
 7 John 132 be waived or altered & no new entire agreement
 New R 354 substituted the Plf may recover on the
 Buller 139 genl count he cannot recover at all unless
 Sta 638. he can recover on the genl count for by
 1 Helw 83 the supposition he cannot recover on any
special agreement

1 Wils 117 But it has been held that where one has perfo
 1 Helw 83(n) mged (fully) a special agreement for performing
 10 Wall 217 wh he is entitled to a certain sum of money
 2 Comyn C 774 he may sue either on the special agreement

or in a genl aprompset

+ But this is directly opposed to the 1st genl
 rule & further there was a special agreement
 to pay a certain sum now in a genl aprompset
 the agreement laid is that the deft agreed to
 pay what the work was reasonably worth now
 if this true the law will imply an agreement
 diff from a special agreement made between
 the parties.

2 R 325 But where the work is not performed according
 Esp 249 to the agreement nothg can be recovered either
 265. on the genl or on the special agreement for
 here by the supposition there is no alteration
 & no rescinding of the original agreement &
 2 H Bl 606(n) where there is a special agreement subsisting no
 2 Comyn C 572 agreement can be impleded.

2 Comyn C 402 Rollet 504 contra

Pleading.

If A having agreed to perform a piece of work & A voluntarily relin, wishes the work when partly finished with B's consent it can recover nothing. If

2 Collap 147

2 New R 616

2 At

Ex D 132

253.

1 Ex R 53.

Stra 638.

10 Cl 13 (n)

Comyn Dig tit action ff) Comyn C 29/560.

In 1 At R ⁷¹⁷⁴ 154. cited in 12 Ch 550 there is a dictum opposed to this rule but the rule must be correct there is a condⁿ precedent

And even if performamⁿ was prevented by inevitable accident the Plf can recover nothing, for such contingencies sh^d be provided for in the contract & the performamⁿ is a condⁿ precedent.

6 East 320

This rule the law with us considers as made with agreement with an implied understanding that inevitable accident shall excuse

The Plf must show in the decⁿ from what a for what cause the indebtedness arose otherwise the deft can have no notice for what he is sued

Co. prol

Caith 276

1 Sid 152

Ex Dig 255

He need not state however what particular goods were d^d what labour was performed to. It is sufft to state so that it may appear that the promise was ^{not} especially a reward. Caith 276. 3 Bul 31. Ex D 255.

The decⁿ must always allege a condⁿ & this omission is a defect in substance

Ex D 255

(116)

Readings

In the declaration the word 'agreed' is as good
2d R 62 as the word 'promised'.

The day laid in the declaration for the
1st R 21. time of the promise is not material for
2d R 80b. the time is no part of the contract & does
3d R 620. not enter into the description of it
2d R 257.
1st R 255.

But in declaring on a specialty or record the
1st R 255 true date must be stated for the date is
part of a description.

Hence if the date was alleged when the debt
was an infant and the debt pleads infancy the
Plf may reply that he was of full age & from
a promise made at a diff't time viz after he
became of age 1st R 223. 2d R 106.

Ep 145 Again where a cause of action is to arise on
(255) 135. request the day alleged need not be the
1st R 16. true day if it appears in the decⁿ that it
was made before action bro't

Where the Plf declares on a special agreement &
5th R 107 relies upon it the Plf must prove the agreement
111. as alleged or the variance is fatal. Ex
8th R 7 agreement to pay 1st Aug^t & Plf proves agree^t
Ballist. 255 to pay 1st Sept the variance is fatal.

47 R 314
5th R 115

(262)

(117)

Pleadings by Defendant.

As to the promise is truly alleged yet if the cons appears to be diff't from the one alleged the variance is fatal the whole cons must be stated.

264.

The claim alleged is also immaterial for the action is transitory 1 Lev 143. 10 Mod 348. (diff't in case of specialties).

Huntington

Pleadings on the part of the debt. The gen'l issue is non assumpsit which puts in issue the whole debt. Under the gen'l issue the debt may give in evidence what any thing which goes to the discharge or exting. of the debt but not that which goes to the discharge of the remedy.

2 Str 491

4 Rep 601

1 Ch 170

2 Le Ray 585.6

4 Cr 181

The debt may also avail himself of the statute of limitation but this defence must be specially pleaded for this defence is matter of law which goes not to the Pl's title but to the remedy or as it is expressed in the books to the discharge of the action.

Exp 147

279.

3 B & P 149 (n)

1 Lard 283 (n 2)

Mars 2 In 500

2 B & P 190

Le Ray 153.586.

5 B & P 2630

Comp 541.

Bullen 207

Verba set off & bankruptcy on this principles are special pleas these go merely to the remedy but admit the debt

And in Eng: the st of lim: must be pleaded & the from the debt it appears that the cause of action is of more than six years standing for the debt in contempt of law is not discharged & he may waive he may therefore by not pleading the stat waive the stat.

(118) Stat of Limitation

Another reason for the last rule is that there are
Ball 207:8 savings to the statute & therefore the Deft must
1 Lev 110 plead so that the Plt may reply even that the
2 Saunders 63(a) case is within the savings.

Exp 948.200 By 21 Jan 1 c 16. This action is barred unless brot within
6 yrs. same in New York.

Exp 148.202.5 Where the Plt has once begun to run no superadded
then 566 cause will stop its running. & it commences to run
Ball 34.5 then the Plt becomes covert.

1 Wils 134. But the time is measured from the time
4. R 300 when the right of action accrues & not from the
1 John R 165 time of making the contract.

Ball 86. If oral contracts are within the Eng Stat of
Exp 148.202 limited statutes. Hence bills of exchange promissory
Carth 3 & verbal agreements &c &c.
+ Shaw 340.

If Debt is not for rent or a parcel demised it
is within the Stat if not for rent reserved by
deed it is not within the English statutes.

Ball 111. Neither does the stat extend to debt agt the Shff
1 Saunders 55. for an escape for this is not founded on any
contract expressed or implied the foundation
of the Shff liability is a breach of his duty

I count we have a stat limiting the Shffs
liability to 2 years.

Is it said that the St does not extend to debt
ag't self for money collected on Ex'n ration sua Bull 91.2
supra. but it is said in Bull 91.2. Bull 246. Bull 242
that the rule is otherwise but in the same case,
it is said that an action on the case ag't the self
for not bringing the money into Ex' per quod it will
not be barred by the Statute. —

A debt barred cannot be set off ag't another debt. for Bull 94.74
as the debt will not support an action it will not plea B. 134
for one B. 121.

But in English Stat there is an exception of such Bull 8.70
acts as concern the trade of merchandize between Ex' 149.
merchant & merchant & between their agents factories 183
same Ex' in New York. this exception has been 2 John R 200
held to extend to cases of mercantile open acts between
persons not merchants where there are items on both sides 1 Wm & 307.8.
sides for such case one item of Ex' within 6. Bull 11.2
years will take the whole out of the Statute Bull 149
(secus in Court vide Wm & 307 1 Day 245) Ex' R 109
1 Wm 435.
Watt. Part 211

But if the persons are not merchants if the
items are all one side the items of more than
years standing are not within the exception. (114)

But between merchants & if the acct is merely
open tho' all on one side it is not within the
the Statute i.e. it is within the exception.

But an acct statute is barred in six years even Bull 71.6
between merchants. 2 John 200. 2 Ves 400. 1 Sed 465.

(120) Stat of Limitations

It has been ruled in New York that the Stat of John 142 bars to an action but on the ground of a
11 John 108. reckoning state probably not to be held
16 John 102. differ 7 Church 41. 31 Grant 314.
2 Comyn 572 (a).

Ball 111. 120. The action springing of the writ is regarded in Eng
Bun 957. as the commencement of the suit. & the true time
Wed 52 of springing the writ may be proved.
East 252
Fellod 107.

Bul 167. But the mere commencement of a suit is no
20 Ray 183. bar unless the suit is proceeded with
Wills 157
Fellod 5. But by the English Stat if a suit is commenced
37 R 662 in time Hobbs gives a judgment which is reversed a
Exp 152:3. a verdict which is set aside by due course of
law the Plt one year after such reversal he
may commence another action Bull 4. 156.
163. 1 Cro 294. 3 Lev 245.

There is also a saving of infancy for a court.
Ball 5. 175 persons beyond seas & imprisoned persons now
124. 49. compro where the disability exists at the time
254 of the accruing of the cause of action in such
2000 cases they may respectively sue within 6yrs,
212 and 214 after the cessation of action disability is removed
Ball 181 in the English Stat no other actions are
580 836 mention except actions on the case for breach
but the clause has been extended to assumpsit.

Ball 182 but the infancy &c are protected by the Stat that they
2 Saunders 171 are not prevented from suing during their disability
3 Wills 145.

Stat. of Limitations

When there are 12 plfs if any one of them is within the seas when the action accrues the absence of the other, does not bring the case Esp 149 within the saving clause for one has the 184 power of bringing the suit for all. 45R 516

The saving clause just mentioned extends to foreigners residing abroad & all persons residing beyond seas Esp 180 and continues until they return into the realm. 31W 145 3John 263

Under 4th Ann & the st of New York the return of the ~~Def~~^{Plf} takes the case from that time out of the Esp 285 6 saving clause & the Stat then begins to run 1John 276 1John 165 1Wil 134

But the return must be such as to enable the Plf to sue Esp 286. 3Allap 271.

As to subsequent acknowledgment vide.

- 1 Esca 263. 12 Vinier 192. 2 Burr 1099. Cont 544.
- 20R 760. 4 East 603(u). Peak 92. 2HRL 340.
- 1 Esp R 435. 3 Esp R 155. 4 Ld 46. 4 East 598.
- 2 Camp 167. 1XR 20. 16 East 418. 4 John 461.
- 3Allap 133. 10 John 35. 15 John 511. 11 Allap 452.
- 4 Allam & Selu 457. 11 John 146. 5 Bunney 576.
- 5 Day 223. 5 Allam & Selu 75. 13 Camp 32 House Ed (u)
- 3 Court R 131. 170. 4 Court 336. 8 Crauch 72.
- 2 Barn & Alder 759. 1 Do 693. - 3 Taunt 380. 6 Esp R 65.
- 7 Taunt 608. 4 Barnard & Alderson 567
- 1 Sergeant & Rall 179. (2 Comyn Con 572 - notes)

122 Stat. of Limitations. New promise re
✓ In the application of the Statute of Limitations the
§ 10 governs for this Statute relates to the remedy
1 B & C. in Bill 60.

2 Bull 215 On this principle it was held in Penn that when the
Plt. assented in 1st case see case he was not within
the saving clause for he was not within the
saving clause of the Stat. of Pennsylvania.

Ball 111 V The Stat does not extinguish the debt & a
Exp 151. new promise may take the case out of the Stat.
207. 1.
Bill 110.

2 B & C 446. 1101 2d show p. 25 B 300. Bull 149.
✓ The rule formerly was otherwise unless the new
promise was upon new consideration 2 Vent 182. Bull 111.

Comp 548. When a devise charged with part of all the
B & C 1105 testator's debts takes the case out of the Stat.
2 P 117 373. Conditioning
Bill 258

Rule the same when there is a new conditional
Bill 426 promise if the condition is performed as from
Exp 281. you debt & I will pay debt. & ex 2^d I will pay
Exp 159 when able if the Plt. proves the debt to be of
Bill 139 ability. Ex 3^d I will pay if you will give me
24 B 116 time. (Quond Example 2^d vide contra Starkie N. P. 11.
4 Ann 461. 95. cited in Comyns Con 2^d vol page 472 (note) Contra. 5 M 318.
5 Ann 511. ^{new} But a new promise to an Exr will not support
the action on a plea of non ap. infra & ex re when
the promise in the debt is to the testator or the
promise is out of the Exr. (over)

Stat of Limitations Acknowledgment (123)

And again the promise to the Exr is no renewal
of the first promise - Ball 117. 20. 25 Reg 1101. 3 East 409.

~~The~~ An acknowledgment of the debt within the Ball 190
time limited is evidence of a promise & sufft 5 Mo 426
to take the case out of the statute.

3 Esp 155. 7

4 East 574.

504

155 R 430. 7

45 46.

20 R 93. 1st R 20.

And it has been s^d that the slightest acknow-
ledgments are sufft as I am ready to acct.
but nothing is due to you Comp 548. Barr 1094.

Rule the same tho the acknowledgment is made
after suit br't Barr 1094. Ball 190.

Is an ackn: to a third person sufft as when it
was made to the debt of the P's atty & this too tho
the debt said 'he was discharged by bankruptcy &
 lapse of time' Ball 190. 2. 3 Esp 157. 4 East 574.

~~From these cases & others this civil principle may
be extracted when there is an acknow. of the
debt within six years tho it is accompanied
with a refusal to pay is evidence of a new
promise to take the case out of the Stat
(the secus formerly) 20 R 178. 2 Vent 182.~~

4 East 574.

An acknowledgment of the debt as a subsisting
debt sufft.

Stat. of Simulations & Acknowledgt.
(124) ✓ An acknowledged debt as subsisting is
not per se a promise but merely evidence of
it if therefore Df to a plea of the Stat
replies an 'acknowledgment' connotes the up:
is bad it sh: be a new promise. 2 Kay: 421
12 C. 223 5 Co 426. 2alk 9. 29. 223.

✓ But to every other purpose an acknow: is
equivalent to a new promise.

✓ Even held that an affidavit by Df for
Ball 195 leave to plead the Stat stating that he
first 604 had not been called upon within six years
2p 290. for pay^t of the debt was proper to be left
to the jury as an acknowledgment. —
thus the law it converts the means of taking
advantage of the Statute as a waiver of it.

✓ Debt pay^t within six years is an implied
acknowledgt 1 Ex 437 (2p 294).

✓ And an acknow: by ~~part~~ part part or other
wise by one of several & delias. is then acknow:
by all. for pay^t by one is in legal effect
pay^t by all.
8 C. 223.

✓ Rule the same tho the party paying
is not a party to the suit Ball 201: 3.
Long Cr. Peak C. 15. 203. 2p 291: 3. 1 T. 204
& John 267. In 2 Vent 251 a contrary rule
w^{as} seem to have been adopted but on examination
it is not so for in that case the form of the finding
governed the case.

Amputet (183)

(125)

Stat of Limitations.

Readings

Where one of two pt & several promisors became bankrupt & the promise within six years had not a dividend this was holden suff to take the case out of the Stat.
per 3 B. & A. 507

Barron: 5
24 B. & A. 40

As an action after dissolution of a partnership by one of the partners takes the case out of the statute.

Exp. 257
6 John 507

Heart 557 Pa 71: 5

The Ct. in this country do not feel disposed to go so far in disturbing the effect of the Statute as the English Ct. do. The rule here and indeed in Eng. is that the acknowledgment must go to the acknowledgment of the debt as existing at the time.

The usual form of the plea of the Stat is non ap; a. actio non accrevit, infra sex annos.

Ball 215: 225

10 Mod 71

1 Vent 191

Exp 294

2 B. & A. 422

20 B. & A. 558.

But upon it appears that the cause of action must have accrued after the promise the plea must be actio non accrevit i.e. for the St commences not from the making of the promise but from the accruing of the action.

- Pleading the Stat. of Limitations
- (126) ✓ And the rule is the same when the promise is to do a collateral thing or request for the cause of action accrues from the request
- ✓ But the same when the right of action from the performance of a covenant precedent Bull 151. Bull 216. Bull 422. 10 Mod 104. 206.

✓ But when the right of action accrued at the time of the promise made non app infra he is good. Ex on a promise to pay money on demand or on request Bull 211.

✓ So in indeb. a promissory founded on a promise implied from an existing debt non app infra he is good for the cause of action accrues at the same time with the implied promise.

✓ But the plea non app infra he is always proper & of course this is regarded as the safest. Bull 218. 2 Saund 103 (n.d.).

✓ This plea must conclude with a verification for it is a special plea & is tantamount to an affirmative allegation that 21 years have elapsed Bull 225. 1 Saund 283.

✓ If the plea goes to the whole debt and is
de ad, to a part of the demand it is so as
to the whole. Ex promise to deliver such a
deed ^{on request} to pay \$100 on another consideration
in demand - Ball 215. Ser 45.

(127)

the plea if ~~an~~ a part of the debt
is bad, for as to the debt, non ~~assumpsit~~ ^{assumpsit} ~~in part~~
is bad, & the Plt must have judgment as to both
demands

✓ This plea must deny the promise within the same
number of years as the Stat prescribes. Hence
non ~~assumpsit~~ ^{repley} ~~intra decem annos~~ is bad because
you can traverse it ~~and~~ by an affirmative
pregnant. But it is ill only on special demand

Ball 267

✓ The deft may in his plea divide the time covered
in the debt by pleading the Statute as to part
Ex sued on two promises. or sued in false
imprisonment for a continued trespass but in
such case he must plead to the rest either by
the genl issue or scilicet. Ball 236. Ball 420.

✓ The rep: to this plea may be genl affirming
that the promise was made or that the action
did accrue within years or it may be special
that he took out this writ at such a time when
was within six years &c. or it may be special
by alleging some fact whl brings the case
within the saving clause Ball 179. 3 B R 662

1 B R 266. 2 Sums 117 (y) Willes 27.

Pleading the Stat of Simulation.

- 128 ✓ The genl repⁿ concludes to the contrary because
it takes upon in the plea not the specific
Repⁿ concludes with a verification because
240. it alleges new matter & must be left open
Burr 702. that the deft may answer it specially.

✓ It has been a question whether in these cases
in all the Repⁿ rules, or in new promises the
Plt sh^d decide in the new promise or in the
original cause of action. once decided in
the circuit at sitting in court that the
action can be brought in either.

✓ Again: the original promise is probably the
one fully counted upon for 1st if the new
promise has been upon the declaration, must
always be a specific one but this form
is genlly not specific. - 2nd it seems to
be imp^ossible to count directly on a new
promise specially & when the promise is
implied from an acknowledgment a prom
part pay^t. 3rd if he sues in Eng^d on the
new promise he must state specially the
consideration of the new promise but all
our forms show that this is not done but
4th the acknowledgment to a third person
is suff^t to take the case out of the stat.
and here clearly the original promise must
be counted upon & not an acknowledgment
after suit but is suff^t & of course here the
new promise cannot be counted on -
and again finally the Stat does not destroy
the debt -

In Count the suit must be brought on the original promise 3 Count

(129)

By Statute limited action on the case except for slander-reprieve. account must be brought within six years from the accruing of the action.

Assault & battery & false imprisonment 4 years

Slander is limited to 2 years

No limitations to specialties. - suits in Count

Entry on lands limited to 20 years.

Accord & satisfaction

By accord is meant agreement by satisfaction is
 1 Pw 451 meant the execution of the accord. accord &
 7 Mod 144 satisfaction means a substitution executed &
 Wilm 135 this entirely discharges the debt.
 Esp D 147
 (279).

Lor 506 It is doubtful whether this plea can be given in
 1 Hill R 472 evidence ^{in the action of assumpsit} under the plea I think it may
 Wilm 135 be for it discharges the debt.
 Comyn Dig
 Accord.

5 East 130

4 Esp R 111

1 Wils 135 But an accord not executed is no discharge
 9 Co 79 (b) of this or of any other action, for this is a bare
 Esp Dig 147 agreement.
 (279. 150)

1 Pw 426.

1 Pw 412 This rule however in case of simple contracts must
 1413. suppose a right of action accrued before the
 12 Mod 538. agreement. for before such right of action accrues
 Comyn Dig a simple contract may be waived by parcel
 Plea 2913. and another substituted in its place.
 Esp Dig 167
 12 Mod 533

6 Co 44 The defence of A & S is pleadable to all simple
 Cro 100 contracts & in genl to all personal actions.

But to make the defence effectual the accord must be entirely performed (H). 7 Co 79. Cro E 304 1 Hbl 135. Esp D 230. (2^d pt 67).

So if the accord is in part executed & the release is even tendered it is no discharge of the action 9 Co 79 (6) 2 H Bl 319. 3 East 251. Esp D 147. (250). Chit B 62. Stra 426.

Not any contract alone cannot be pleaded in satisfaction of a former contract of the same kind unless it appears that the new contract is in some respects better for the Def than the former one. E.g. hastening the day of payment or altering the place of payment. Hobes. Cro E 777. Esp D 230. For one executory contract unless better can in no sense be deemed a satisfaction 9 Co 79.

(132)

But in those cases where there are two contracts for the same debt by the same person to a recovery in one contract is a bar to an action on the other.

The satisfaction must appear to have been of some value in law. Ex. Reuben et al. vs. E. of redemption is no satisfaction for a legal demand 2 Will. 16. Litt. 5332. Esp. 230. (2 part 57) I doubt this example at present.

The satisfaction pleaded under an accord must not appear on the face of it unreasonable. Ex. 3 Co. 117 when the contract is for £50 & the defence is £5. per the 420 under an accord in satisfaction same is £44. 5 East 232 This rule supposes the sum paid at the same time 2 East 232 as with the larger sum became due £50 due 1 Will. 16. 7 tomorrow may be satisfied by pay^t of £5 to Esp. 230. day (2 part 57). 5 John. R. 386. 271.

This rule extends only to cases in which the insufficiency of the satisfaction is self evident Ex. perer can 3 Co. 117 is a good satisfaction for £1000. — It is therefore Esp. 230 a rule that the Ct will not inquire into the (N. 2 part 57) value of the satisfaction. And the delivery of any thing of a different kind from the thing contracted for is a good satisfaction —

Accord & Satisfaction (133)

Is too any one specific chattel may be a
good satisfaction for a contract for any other
chattel for it is not self evident as matter of law
that one chattel is worth more than another

Payment of a smaller sum of money in satisfaction
of a larger is good if paid before the larger sum
became due, or if a stippled place of payment
was selected. The burden of proof lies on the
defendant to show the unconscionableness & he can
show the insufficiency only by self evident
proof from the face of the record.

5 John 271

So if on the faith of an agreement to accept less than the amt. due in
full satisfaction a third person be hired in to become surety for any
part of the debt on the ground that the debtor will thereby be discharged
from the remainder. The agreement will be good. Steinnman tab. & Magnus

11 East 390. 3 Camp 475. 5 Carington & Payne 456.

It is said that nothing can be pleaded in
satisfaction of a bond but you may plead
money so paid in satisfaction of money due
on the bond. i.e. money due by the condition of
the bond.

20 W 616

6 Co 43.

5 Co 117 (6)

1 Pl Co 420.

12 Co 102

6 Co 254, 680

It is said in the last case that the accord
& satisfaction must take place before the breach
of the bond after breach nothing that of an
acquittance by deed will answer

46

7 East 148.

o In an action on a parol contract a part
accord ~~accord~~ executed is a good defence
 1111 17 but to a bond a parol accord is not suff
 370. the accord must be by deed
 661 43.

o Again it is held that to a deed for any thing
 1107 17 right money accord & satisfaction can in no
way be pleaded. I think there is no
 reason for this rule.

The plea of accord must allege that the Def^t
 p^r is to be so much in full satisfaction
 & that the Pl^f accepted it as such Str 22.
 3 East 257. Str 573. Exp Dig 229. [2 part 66.7]

But the safer mode is not to state the
 1105 10 particulars of the accord at all but merely
 1105 73 to allege that the Def^t is & the Pl^f rec^d it
 1105 25 supra for then the Def^t is not tied down
 to the proof of particular agreement.

(35)
Accord & Satisfaction

The breach of a mere accord on either side
is no cause of action. an accord is of no
force whatever in the law unless executed

2. H. Bl. 317. 20 Ray? 122. 1 Selw 137. 5 East 230.

1 Rom 429. ...

This rule may undoubtedly do great injustice
as Cred: agrees to receive timber & it is prepared
by the debtor & the Cred: refuses to accept.
I think that in a strong case a Ct. of Equity
w^d interfere.

Acc^d? Isat. will never support a plea of performance
or payment / Root 75. payment is a thing
entirely diff^t from accord & satisfⁿ on the other
hand under plea of paymt accord is not suff^t

Accepted by the def of a satisfaction from a
third person is no defence, but they suppose the
third person not to be an agent for the def^t.
The rule apply to such a case as this of Partridge
of B a bond ag^t C & A purp^t in B's name now C
cannot plead time if he has paid the bond to B.

Bro C 41.

2. H. Bl. 147.

1801.

of John 37.

5 East 294.

(136)

Payment.

This may be given in evidence under the
10 Kay 207 quod ipse & may be pleaded specially

1866-54

18-9.

2 Burr 1310 1 Selw 146 1 Chitt R 491.2 496. E. 2147.209

Ex 147
180

Such payment is no plea it is merely evidence
in mitigation of damages if Def^t pleads payt
payt Pl^f may demur but def^t has p^t payt he
must suffer defect & payt to be heard in damages.
If he pleads part paym^t & the Pl^f demurs the Pl^f
will have judgment for his whole demand

Payment of the whole principal due if accepted
by the Pl^f ^{as in full satisfaction of the interest} ~~as in full satisfaction of the interest~~ ^{as in full satisfaction of the interest}
afterwards bro^t for the interest. 5 John 271.
3 John 229.

7 R 24
184

1200.205.

408.

517.

6 R 12

5 R 53.

Salk. 124 Chit. Bills 122. 154. E. 3.

1 Conn. R 404. 5 Conn. R 74. 11 John R 409.

If the vendor of goods takes notes or bills of exchange
for them & the notes or bills prove not to be good
tho' genuine, the security are no payment unless
the vendor agrees to take the risk. & to recede them
as payment for these bills & are regarded merely
as the means of obtaining payt.

And if a C^r is induced by fraud to accept a note as payment - ex. pl. a nccy to assume the risk yet the note is not payment & the vend^r may sue for the goods taking no notice of the note &c. (Exp R 43a & Exp R 322. Comyn 38. 6 John 110. 3 Camp 352. contra). analogous case 3 Taunton 274.

In the case 3 Camp 352 L^d Ellenborough decided that the Pl^{ff}'s remedy was by an action for the deceit, where it was a part of the original contract that a note sh^d be rec^d as paym^t for the property sold. - & it is to dect on bond payment after the day is no defence for the condition is broken. but now by st law pay^t after the day is good Exp D 225 (2 part 62).

If an oblig^r is payable on a day certain the Deft^d should not plead pay^t before the day for the issue if found for the Pl^{ff} would be immaterial he sh^d plead paym^t on the day & paym^t before the day will support the plea 2 Stra 494. 2 Bulb 944. 1 BC R 210. 2 Saund 319. 2 Wils 150. 173. Bull et P 174. Exp D 225. (2 part 62).

(138)

Payment.

If money is payable by contract on a before a certain day the debt may plead payment before the day still if the Plt were to traverse payment before the day the issue w^d be immaterial the Plt must therefore in his traverse deny that the pay^t was made on before or after day. This is an anomalous mode of traverse for it goes beyond the allegation of the Plt wh^{ch} Debt^r is in no other case obliged to do Ch.

When pay^t is pleaded after the day it must be pleaded as of the whole amount then due viz principal & interest. Esp D (2 part 63)
But vide 3 John 229.

If there are several debts due from one person to one & the same or the debtor may elect to wh^{ch} he will apply it. But if he makes a genl payment the Cr. may elect to wh^{ch} to apply it 2 Stra 1194. Cr E 68. 2 P^W 308. 1 Vern 607. 1 Selw N P 146. 7. Esp D 228. (2 part 65)
Kimb

The creditor is allowed a reasonable time to elect but after his election is made & communicated to the debtor the Cr. is bound by it. 2 B & C 65. If no election by either party the law applies the payment in full to the oldest debt 2 B & C 65. Peake Ca 64.
or the payment is applied according to the intention as gathered from all the circumstances — Stark Lr 14. 1092. 3. &c —

In Equity however if a debtor makes a
 genl^l paym^t it will be applied to a debt
 with interest. this is founded on the
 presumed intention of the debtor. 1 Vern 243.
 2 Esp Eq 225 (2 part 65). 1566 334. Stark E part 4. 1093, note.

To debt on bond by English law there is no
 limitation by Stat. but where a bond has been
 dormant 20 years the jury are directed to
presume paym^t. By our law debt on bond
 must be paid for within 17 years.

Coverture

May be given in evidence under the genl^l
 issue non assumpsit or pleaded specially for
 or does not amount to the genl^l issue for it
 admits the declaration. vide Hus W. p.
 100 l. 134. 5. 12 ill 2 101.

Infancy 2 lev 144. 15 ill 138.

Bankruptcy of the Deb^t is pleadable in liquidation
 the debt was due before bankruptcy not if it
 arose afterwards. Bull et P 152. Cook B & 459. -
 1 Ch 26472. 72 R 396. Laws 713.

(140)

Bankruptcy of Debt

If he has obtained his certificate if the debt might have been proved under the commission but if the debt was subsequent to secy. 1. R. S. 79. 3 Mils 262. 2 B. & R. 764.

In this case however the debt still remains due in conscience & therefore the debt is a good cons^{ts} to support a new promise Comp 344. Doug 152. 378. 501. esp. & 155. 22 R. 765. 2 A. B. C. 116.

Bankruptcy of R^{ts} or debt must be specially pleaded 1. Annot 103 121. Ch. on B. 195.

Assumpsit. (1741)

(141)

It has been a question how far our special
bankrupt laws are constitutional &c.

But it is now settled that these local bankrupt
laws are good so far as they discharge the
person of the debtor but not good so far as
they discharge the debt properly. for to
exempt the property is to discharge the debt.
But exempting the person merely regards the
remedy. H Wheat 122
209
6 Wheat 131.
6 Conn 8
Hempstead

An act ^{discharging the person of the debtor} therefore can operate only as
the law is in other cases. But where the act says
constitutionally discharge the debt, the discharge is valid in
other states.

Release

Not in debt on simple contract this
may be given in evidence under the rule
if not pleaded specially 2 Burr 1010. 3 M 1353
10 Ray 566. 707.

The rep^y denying this plea is non est fact
1 Selw 141.

(142)

Release

A release must always be pleaded as being by deed for a release must be by deed or it is not strictly a release, & a mere verbal discharge will not discharge the contract after a right of action has accrued
2 Wils 376. Esp Dig 1167. (cont.)

A release of all demands will not discharge a duty afterwards accruing for demands means of existing demands. Bull v P 106
1 Ld Ray? 511. Cro 49. 1 Salk 171. Ch Billy 83.

A release therefore of all demands by the holder to the drawer before acceptance or a refusal of acceptance will not discharge the bill on the drawer but if after refusal to accept or after non payment a release of all demands discharges the drawer.
1 Ld Ray? 65. Esp D 308

A release given after suit bro't may be good to discharge the suit 1 Sells 147: 8. Selw 141.
Bull v P 304. 3 N 16. 4 East 507.

Bond & judgment.

(143)

Another defence is that the Deft has given to the Plf a bond for the same debt for the bond merges the simple contract & the action must be brought on the bond 1 Burr 4. Chit B 62. 119. Bull & P 155. 3 East 251. Comp 129. Esp D 147. 164. (251)

But a bond given for a simple contract debt by a stranger does not merge the simple contract for the bond is here merely a security 1 Pond C 423 63 R 176. Esp D 190.

This defence may also be given in evidence under the general issue for it extinguishes the debt.

A former judgment by either party for the same cause is a good defence. If the Plf recovers in the former action the contract is merged in the judgment. If in the first action judgment was for the Deft on the merits, or on demurrer the judgment is an estoppel.

Rak 614.5
Bull & P 332
6 Co 7
Cro E 668
77 R 269
2 B & R 527
1 Bay 170

(144)

Judgment & Award of Arbitrators,

But a former recovery on any collateral ground is no bar. Ex if A has recov^d ag^t B for a fraud in recommending C as worthy of credit when he was not this does not prevent A from recovering ag^t C on the contract with the fraud proven for the two actions are not for the same thing 1 Day 22. 3 Esp 203. 2 Ark R 124 Ark R 172. Bull et P 67.

✓ An award of arbitrators deciding the same cause is a good defense while in fact it is the same as a judgment.
1 Chit R 170:3

✓ Former judgment & award of arbitrators may be given in evidence under the general issue.

Tender & bringing money into Court.

Must be specially pleaded. It merely deprives the Plt of costs & gives them to the deft. It does not discharge the debt.

1 Saund 283 (n 2) Chit B. 148

Tender is an offer to pay a debt or perform some duty.

✓ In some cases where tender is of no avail money is bro't into Court, which substantially answers the purpose of tender.

✓ This bringing money into Ct is adopted when tender has been omitted or where in certain cases the plea of tender is ineffective. This proceeding is distinct from that of bringing money into Ct under plea of tender. It is bro't in under the great issue & under leave of Ct & Bac 1 Tender 11. It is 787.

✓ Leave of Ct is sometimes granted by virtue of a positive Stat. law. But in general it is bro't into Ct by virtue of the discretionary power of the Ct under a rule of practice called the con non rule. Bac
Conyn Dig head 2 n 28/

(146)

Bringing money into Court.

- ✓ The effect of bringing money into Ct under the same rule is sometimes to put an end to the action.
- ✓ But more commonly the effect is that the money deposited is struck out of the declaration so that the Def cannot claim that money in evidence, he can only go for what he claims more than is brot into the Ct. Bac 4th tent h. 20.

- ✓ In general money may be brot into Ct in all cases, in which tender will be a good defence.
Bac 26.

- ✓ But in Court bringing money into Ct except under plea of tender is unknown for here it is unnecessary here tender after day of paymt is as effectual as tender before on the day of paymt. tender here is good after suit commenced if it includes costs.

+ from next page.

But the tender of a larger sum, demanding charge, is insufft.
6 Taunt 336. 2 Esp C 401. 3 Camp 70. 4 Stark 1393.

Tender

✓ The party making tender must make known that he offers the money in discharge of some debt or duty.

Latet 70
1 Selw 174
2 Wils 74
5 Bae 4

✓ Merely declaring one's readiness to pay a debt is in genl not enough it is no tender. But if then the debt came to Plt with the money, tend (b1) in his hand & declares his readiness it is not sufft. he must by action tender an offer.

2 Lev 209
3 Do 104
12 Moo 353
12-37

✓ But an actual offer of money in a bag or box is sufft the debtor need not count out the money to the Cr. But tender (b1) 5 Co 115. Clott 205. 33 R 684. Esp & 300. Str 777

✓ In case of several debts between the same parties the debtor may apply his tender to whk of them he pleases, But (b1).

A tender of more than is due has been held good ^{if} [the Cr is bound to make the return] [but the rule is that such tender is good where the Cr does not object on the ground of its being too much.]

2 Bk 251
Bak R 31, 114
1 Selw 171, 2
5 Rep 114
1 Wils 274
3 R 683
2 Esp Ca 711
45 Stark 1392

Tender

✓ If a person is bound to do one of two things at the election of or the tender to be effectual must be of both so that the or may make the election. 1 Com: 68.
Bar - the tend (b. r. of p. 300) - 2 p. 100

A tender of any kind of money made current by law, is good or foreign coin (some exceptions to foreign coin by US Law.

Lat. 14 Cal. 448 Com. 317 Exp. 5 166. 1301
By the act of Congress foreign coin made tender by weight

But by Cons: of US no state legislature can make any ^{other} thing than gold & silver coin a tender. Con. U.S. art 1 510. - 12 Wheat. 265
Story on the Conf: 238.

By the laws of US copper cents are a tender it has been questioned whether a tender in copper cents of any thing more than the fractional part of a dollar is good. I think it is a good tender to any amt the cents are as much the current coin of the US as Eagles or dollars. But why should the sum be fixed at a dollar if the principle is correct it sh: be fixed at five cents

Counterfeit coin & notes &c

But a tender in bank notes is good
unless objected to at the time. on that
ground. 35 R 554. Peak Cr 258. 2 B & P 526.

11 Eq. ca 318. Still on B 172. Cr & D 166. (300.)

Bac still tend. Cr 21. 13 R 402

so tender of foreign coin?

7 John R 476. where creditors agreed to accept bank bills -

Held in Engl: that tender of counterfeit coin
if accepted by the Cr is good provided
there is no fraud. the law supposed is
really that of payment. The Cr regard this
case as the case of the sale of an unsound
chattel with fraud & with warranty.

5 Bac tender (12). 5 Co 115. Co Litt 208. 12 R 402?

743. But see 2 John Rep 455.

In allap payment in forced bank notes was held
not to be good. 6 allap 182.

In Ct!! the same rule 2 John R 455. 5 Com 71
The Ct in these cases consider the bank notes as
mere security for debt & not as money. so that
there is an implied warranty that the note is in fact what it
purports to be.

Where payt is made in counterfeit bills of
exchange or promissory notes the payt is not
good.

18 R 3

7 R 64

2 Cam 117

2 John 68

5 Com 471. 5 R 513

7 R 66. 6 R 52

(150)

Tender

It cannot be subject is regulated by State

The actual tender may be dispensed with if
by the express declaration of the creditor that he will not
accept it, or by some equivalent act. ~~It is required~~
~~as dispensing with the production of the money~~
Peak R 86. Peak Cr 259. 4 Esp R 67. Esp & 161. (300
10 East 101. 5 Esp Cr 48. Stark Cr part 4, 1391.

As it seems in jail more informality in making the tender
will be cured by a refusal on the part of the Plf. to receive
the money. 4 Stark 1393 & the case there cited

A conditional tender is not good Cr on case
that you give me a receipt ^{in full} for in law the Cr
cannot be compelled to give a receipt

Peak R 174. Esp & 161. (300) Stark 1393 & the case there cited

It would seem from some expressions that it may
6 Can't P 637. sweep that the Cr should give a receipt when required
1 Camp 477: 8. but I do not think this true
Esp & 161. (300). So on condⁿ that the money shall be rec'd in full of the debt due

to the Cr. ~~It is required~~
to deliver up the debt. 4 Stark 1393. 1 Camp 495.

But tender to a person authorized to receive
pay^t is good 1 Selw 173. 1 Camp 477: 8.

Tender to one of several joint creditors tender to all 3 P 2683
4 Stark 1394.

1 Camp 1146. If tender is made of only part of an entire
Esp & 161. debt the Cr only loses interest on that part
(300). it does not bar the action.

where a place of payment is named in the contract the tender must be made at that place
C. & 210. Bae & the tender c.

where the contract is for the payment of money in
gold & no place of payment appointed tender must
regularly be made to the person (It) unless out
of the state be. Com Dig Cond. § 10. If then
It in such case is out of the state what must
be done? It will be suffice to answer readsup be &
that C. was out of the state. I think it will
suffice to tender at the house of the Deb!
this is well & why at Deb's house? & Bae & the
tend c. 2 DM 378. Bae & the tend (h). Idid 30
Poul at 457.

If rent spring out of land tender may be made
to the person of the C. or on the land. the reason
is that originally rent was payable in the produce
& the landlord was bound to take the crop from the land
C. & 210. C. & 48 Bae & the tend (c)

where bulky articles are to be tendered & no
place appointed the C. is not bound to tender Bae & the
to the person & the C. is not bound at tender
all times & places to receive the tender. Ex parte 20
The party bound sh. require the C. to
appoint a place & a delivery at that place
is good. If the C. refuse to show a place the
debtor may appoint a place & give notice to
the C. & deliver it there. I think no rule will protect

(152) Time of tender.

after action hot tender is not good
for it is now too late to defeat the Plf's
right to costs. the Plf has attached in
himself a right to costs. they can
operate only when money is payable on
demand. If a when it is payable at a
certain time it must be made at that
time. 5 R 629. 13 ac 4th. 1 Selw 173.
1 B & P 391.

✓ In Equity a tender of debt & costs is good
pending a bill & this is the rule in the
statute law. 13 ac 4th tend (b).

Abbott & Gordon, If money is payable on a certain day
statute & 1396 tender before the day is not good the Pl
17 May 24 is not bound to accept.
20th 269 ✓ But where money is payable on or before
a given day tender before the day is
good 1dellon 530.3. 13 ac 4th tend (d).
Co Litt 210. n. 5 Co 114. II Bull N P 174 Stra 994
2 Barn 944.

If money is to be for a goods etc at a
place certain on or before a tender at
that place is not good except on the last
day mentioned which the Pl is present at
that place. the day is not fixed & the Pl
is not bound to be present all the time he
13 ac 4th tend (d). 5 Co 114. Co Litt 210. n. 5 Co 114. Comyn Dig
cond. 7 s. 9

But if the P^r is not present on the last day a tender at the time & place on the last day named is good but it must be made at the uttermost convenient time of the day by which is meant the latest period of the day which will allow the business to be transacted before sun set.

Co. Litt 202
Bac 4th
tind (2)
5 Co 114
Co 202 211
3 Lev 104
Stra 777
Salk 224

But if the parties meet before the latter part of the day a valid tender may then be made.

And in the first case where it appears that the P^r was absent the Plea must allege that the tender was made at the uttermost convenient time of the day.

But in the case of inland bills of exchange and promissory notes the debtor is allowed the whole day for payment.

Damus 207
Cutt B 153.
(Exp 12)

In some circumstances beyond the control of the parties payment or tender cannot be made at the late part of the day for in a tender may be made at the latest time of the day in which it can be made. As in transfer of stock tender may be made at the latest convenient time of the hours of business. Rollod 530. Salk 224. Stra 777. Ray? 511.

(154) Tender

suppose place appointed & no time of payment. In this case the debtor on giving notice of a time future & tendered at that time in absence of the C^r is good. Bae & H tend (d) Co Litt 211.

But in this last case if the contract is to pay money the debtor on making the C^r at that place may always make a valid tender for the C^r is presumed to be always prepared to receive money.
Co 114
Cro 14
Bae tend (d).

If neither time nor place is fixed & the C^r is absent but not out of the realm. Equally if the debtor gives a reasonable notice of time & place & a tender according to appointment will be good. 2 Plow 375. Bae & H tend (d) (d). Probably the same rule will be adopted at law.

If the article is ^{ponderous, is not portable} & neither time nor place app^d the party bound must appear at the creditor's house or place of residence at the date of the contract & tender in pursuance of the app^dment will be good. (see) Common Law 2d 189. Co Litt 210. 4 Leon 46. But if he refuses to app^d time and place the debtor must app^d reasonable time & place where he may make a valid tender in the absence of the C^r.
If the contract is by gift in character of loan & delivery on demand in general the creditor it seems, may deliver at his own house. 1 Conn 255. 5 D. 76. 16 Mass 473 & John R 474.

Consequences of tender.

✓ In good tender of money discharges not the debt but the nominal damages for detention - the costs & 12 s. 303. 2 s. 258. Lang 2124 139. 140. Comyn & R. 2 w. 28. - 1 Rev 209. Carth 133.

○ When without any preceeding debt a debt is made a grant in nature of a mortgage to secure a more just tender according to the condition discharge the whole claim for from the nature of the case it discharges the claim & there is no debt independent of the lien. Pontellat 254. 10 Co 77. Co 207. 92 Bue 246 tend. 31.

○ Such w^d not be the case if the mortgage had been to secure a debt.

✓ The Cr right to costs may be revived by a subsequent demand of the money & the refusal of the debt^r to pay. the subseq^t demand & refusal destroys the debt tender & 207. Bue 246 tend 13. -

✓ Where debt prevails on plea of tender & the money is taken by the Plf the debt is taken entitled to costs for the tender, discharge the action Bue 246. tend (i) but it is not necessary for the Plf to take the money to entitle the debt to costs for the debt prevails in the end.

(156)

✓ But where one is bound to pay sumbray
2 Kent C 508 article, a tender duly made discharges
the whole duty, not^t only the action
but the oblig^{ty}. So long as he is
merchandizing gently, & the debt may
bear the merchandise where he may be bound
to tender it & have no more care with it.
Co Litt 207. Bae oth tend. 2 Roll 524
2 Kent C 509.

Port 55.64 This rule has been approved in Court to
198 extend to all specific articles but I
think this incorrect. Ex: a gold
watch &c. vide post

Hamp. 1817 When is tender a good defence?

✓ In good tender is a good defence in all cases in which the debt or thing contracted for is certain or which can be ascertained by computation. as in debt for a sum of money or for a sum certain or in an action for the non delivery of ascertained specific articles. But in case of common law bill tender can be no defence. Bac abt tend (c & d).

But this is not universal & where a sum is not due before action bro't tho' the sum be certain tender is no defence & especially for breach of Statute. In this case however money may be bro't into Ct under the com rule Stra 127
Bac abt tend (c).

And in all cases in which tender w^o have been a good plea money may be bro't into Ct if tender has not been made. Bac abt tend (c).

In ap. for uncertain damages then tender ^{of the damages} is no defence for what ought to be tendered cannot be ascertained except by the finding of a jury & the debt is not bound to receive any sum he may insist that the sum is not large enough but if the damages are agreed upon by the parties then the sum is ascertained & tender may be good Stra 717. Halled 270. Walk 596. Bac abt tend (c).

When is tender a good defence?

- Q But in indeb. ap: tender is always a good plea for if the sum is not ascertained or capable of ascertainment the action cannot be indeb. ap: Bac 4th tend (h) Salk 23. 597. Colod 128.

In debt or cov^r for rent tender is a good plea Salk 596.

- o It was formerly held that tender was not a good defence in indeb. ap: on quantum mer. a verdict. 2d Ray? 258. Colod 187 but in genl it seems that now it is a good defence in such cases

- o But when the damages cannot be ascertained with the judgment of jury, tender is no defence. 2 Binn 1120. Bac 4th tend h
Ex Bond of indemnity Colod 598. 57 Bac tend (h).

- o Tender of suff^t amends is a good plea in replevin in case of cattle taken damage feizant. but the damages are then uncertain & if the jury find more damages than the tender the defence will not avail
This rule is allowed because the injury is supposed to be involuntary 5 Co 76.
2 Chitt Pl 521. 522. Bac tend (h).

And by St 21 Jas 1. Tender of satisfaction
before action brot is a good defence in cases
of involuntary trespass 3 Ser 37 Bac Ab
tend p. 108. 2 Chitt R 521:2.

It seems doubtful whether this statute
extends to any involuntary trespass except
such as is done by cattle Sta 594.
2 Chitt 521:2. Indeed the object of the
Stat seems to have been to allow this defence
in such cases of trespass in which it was allowed
at C. & in the action of replevin.

Substantive to a limited extent in some
Statute Books, Sect 6.

- In trover for money converted the sum may
be brot into Ct under the Com. rule. But in
trespass for money the sum cannot be brot into
Ct for the damages in trespass are presumptive
the Plf has damages for the vi & armis but
in trover the value of the property is always
the ^{measure of damages} ~~measure of the property~~ Bac Ab tend p.
Sta 142.

- Could tender be pleaded in an action of trover
for money converted I think not. at Ct
there is only one exception to the rule that for
that length is no defence & this exception is
that of replevin. In the Ex: Ct of C. B. & C.
the deft has been allowed after a rule to ~~show cause~~
show cause to the contrary to bring property
into Ct in an action of trover for such property.
But not so in B. R. Bac Ab 33:4. Damages 220.

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Mode of pleading tender
✓ Even requisite to a valid plea of tender
must be alleged in a plea of tender.
Bac 4th tend (1) talk out

Thus Plf must allege that the tender was
made at the uttermost convenient time of
the day, when Plf was about.

he will find in ~~the~~ ^{the} space of an
hour next before ^{the} setting of the sun &
he offered then & there \$1. Cr. 943. Talk 6234.
12 collod 536. 2d Ray? 638. Stra 777. 533. 500 114
1 Selley Entry 144. 2 Ch 498.

✓ If the Plf was present at the time of the tender
it is not suff to allege that the Plt was
ready. Bac 4th tend s. 1. 3d Ray 104. 2d Ray.
Joy 74. 2 New 74. 5th Sig 159. (114198).

Strat 45. But if the Plt is absent at the time & place
Long 66. a final tender is not necessary, ~~to~~ ^{to} ~~be~~ ^{be} ~~made~~ ^{made}
2d Ray 686 the next. to be done is to serve notice
last 203. ~~to~~ ^{to} ~~the~~ ^{the} ~~debtors~~ ^{debtors} But where specific
1d Ray 113. articles are to be delivered at a certain time & place, in
with 413. the absence of the creditors, the articles must be set apart &
Smith v Loomis 7 Conn. R 110, xxx designated by the debtor, as
5 John 119 to enable the promisee to distinguish them from others.
1 Conn 452 & these facts must appear on the face of the plea
4 ellap 474.

or too where on the time appointed the C.
is dead & no legal representative is app^d
reading is suff^t. 2 How 143. 5 Bue 16.

And where the C. names an actual tender
allegation of tender is not necessary
Dow C2. 1. Helw 172. Park R 15.
allegation of tender is suff^t.

§ If it does not then appear that the C. was
absent at the time the debt must allege
not only a tender but a refusal by the
C. & the C. is always deemed to be present
unless it appears in the plea that he was
not present. If refusal is not alleged

it might be that the debt made a tender
and instantly retracted it. Park 223.

1 Hed 13. 2 Ser 23. 2 Bound 332. 2 Ray 67. 164.

Exp & 100 (299). It has been held that the

suspicion of refusal is cured by retracted

Park 223 Exp & 100 (299)

As to the mode of praying judgment on this plea
vide 9 Co 74. Co Litt 207. 1 Bue 15. Park 223.

2 Ray 254

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Effect of pleading tender

The same issue & tender can not be both pleaded to the same declaration or to the same part of it. 2 Baines n. t. 201. 202. 51 Dac. 6. One answer is that these two pleas require debt usually in respect to the judgment to be rendered the good goes to the discharge of the debt tender goes only to the costs.

✓ Where the duty is payment of money it is in vain not enough to plead tender & refusal when the plea does not discharge the indebtedness but merely goes to the costs the debt must always allege that he always was ready & always has been ready since the tender & that he brings money into Ct.

But where tender destroys the obligation it is suff. to allege tender & refusal without subjoining. 2 B. n. 573. C. 201 207 210 275 51 Dac 16 1 Mo 129.

○ Sometimes debt must plead total temp. refusal & sometimes it may be omitted.

If the contract was to pay on demand the debt must plead total temp. refusal tender refusal & still ready & brings money into Ct. for in this case unless he pleads 'always ready' ~~is that without such allegation~~ his plea is inconsistent with the fact that the Ref. demanded & the debt refused.

Count 444 East 101. 1 Dac 411. tender & 3. 2 B. n. 254 272 11 B. n. 112
Exp. 159. 1 East 111. 175 14. 2 B. n. 254. Count 413.

o In all cases in tender up: the debt must always plead 'tunc tempore'

o In cases in which the debt pleads with a tunc tempore the Plt may reply that the debt demanded & the debt refused before the tender for after refusal the Plt is not bound to accept tender the debt is fixed
20 Ray 254. 2 Salk 623. 12 Mod 153

~~The~~ Plt may reply demand & refusal subsequent to the tender for the demand & refusal does entirely away the effect of the tender

o But if money was payable at a particular time the debt may plead that he has been ready since the tender, that he tendered on the day appointed &c. he need not plead here tunc tempore &c. vide 107 Salk 623. 1 H

o But here also the Plt may reply a subsequent demand & refusal. for the debt must after tender, be always ready. it has been supposed that he must keep the intended money tendered but I think that they is not necessary it is suffice if the debt be ready
5 Benc 13

✓ It is the contract to deliver sundry articles & it is not necessary to plead a tender after tender & much less to allege a perfect or it is sufficient merely to allege tender & refusal & this is a perpetual bar & discharges the whole obligation 9 Co 74. 60 Etc 207. 2 R 524.

✓ It is said indeed in the books that the man must allege that by reason of the weight the articles cannot be bro't into Ct. but I think this unnecessary for the Ct must know judicially from the description in the contract that it is too heavy to be bro't into Ct. 1 Bac 497 and 44 Etc 354. 1 Tra 638. 20 Ray 53. 254. 643. but in case of money a perfect is necessary & the money must actually be bro't into Ct or the plea is void. & the Plf may sign judge as for want of a plea 1 Tra 638. 51 Bac 497 and (h. 4).

o It is laid down in our older books that in an action on a penal bond if the deft pleads tender with an uncoin piece & a perfect & the Plf pleads tender & traverses the tender & it is found for the deft i. the deft may take back his money.

12 Etc 597

- o For the law intends to punish the Plf for false pleading & by endeavoring by false pleading to subject the deft to a penalty.
- o But the rule is now abolished the reason has ceased since penalties are not now recovered in Ct of law 1 Saund 33 (n) 2 R 645. 11 B & P 332. 5 Etc 261.

Consequences of a tender of cambus articles,

In a contract for the delivery of cambus articles, on a tender & refusal regularly made some hold that the propy vests directly in the creditor, the debt it is settled is discharged, but I don't think that as long as he refuses, his propy the debt cannot fall it upon him unless volens. See H Rep 295. — But vide Kent's Comm 2 vol 209 & Johns R 474

It is held by others in such case that the debt is extinguished & that the Cr can never claim the property so refused but I don't think this too strong except under the old rule

See Little v Chipman 1123.

Others again hold that the debtor must keep the property for the Cr until he chooses to call for it.

But on principle if the Cr refuses to accept the debtor is at liberty to leave the propy to its fate. or he may keep the propy as a mere bailee or he may waive the tender & hold the propy.

Consequences of a tender of ambiguous articles.

II Debtor may have the property to its fate if he does so, the debt is discharged for the rule of pleading is decisive - how can he be obliged to become bailor for the C^r. I have the C^r may make the property his own at any time for the Laining it is a perpetual tender.

III The debtor may make himself bailor for the C^r

But if in such case the C^r should sue on the contract & be defeated on a plea of tender on demand & refusal the C^r may maintain trover for the property for the judge is a paying for them - the judge vests the property in the C^r in analogy to the case of vendor who sues vendor for the price of goods remaining in the hands of the vendor. The judge prevents the debtor from rescinding the tender.

If on refusal by the Cr to accept the
tender the debtor sh^d retract, & waive it
& take back the property as his own he
is liable on his contract & if he pleads the
tender, it may traverse it

But if the debtor instead of thus waiving
sh^d afterwards convert the prop^y the Cr cannot
still enforce the contract for here has been a
good tender not waived — but if suing
on his contract he is defeated in the plea
of tender he may then have trover for the
property for that judge vests the property in
him —

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Sett. off.

This is not at all a defense to this or any other action but by St 2^d & 1st Geo 3^d they is made a good defense 1 Selw 168. Esp D 235. 2 part 75f.

In Equity a Debt might have in certain cases obtained a set off without any statute law as he may now have in this ~~country~~ state at present. 3 Bl 804. 47 R 143. Comp 56. 67 R 456. 24 R 440. 14 Bl 657.

But by these stats mutual debts tho' of different natures may be set off at law provided both are due in the same right & provided the debt due to the debtors was due to him at the time of the action 1 R Laws 1151 Ball & P 186. 1 Esp 375. 10 East 418.

The debts must be mutual
Hence a separate debt can not be set off ag^t a joint debt, a debt due from one particular cannot be set off ag^t a debt due to one partnership.

Sett. off. at law

1 Selw 164. Esp D 235. 6 Conn: R 14. 7 Conn: R 221.

Where a bona fide assignment has been made (at least) that a set off will not be allowed if a debt in favor of the debt ag^t the nominal Dlf 2 Selw 110f. Dutton's Dig 506 10 Conn: R 30 Robinson v Lyman.

foreign attachment.

It is a good defence to the action, sounding in contract, that the debt has been recorded from ~~the debt~~ ^{the debt} by a ~~debt~~ ^{creditor} of the ~~debt~~ ^{creditor}.

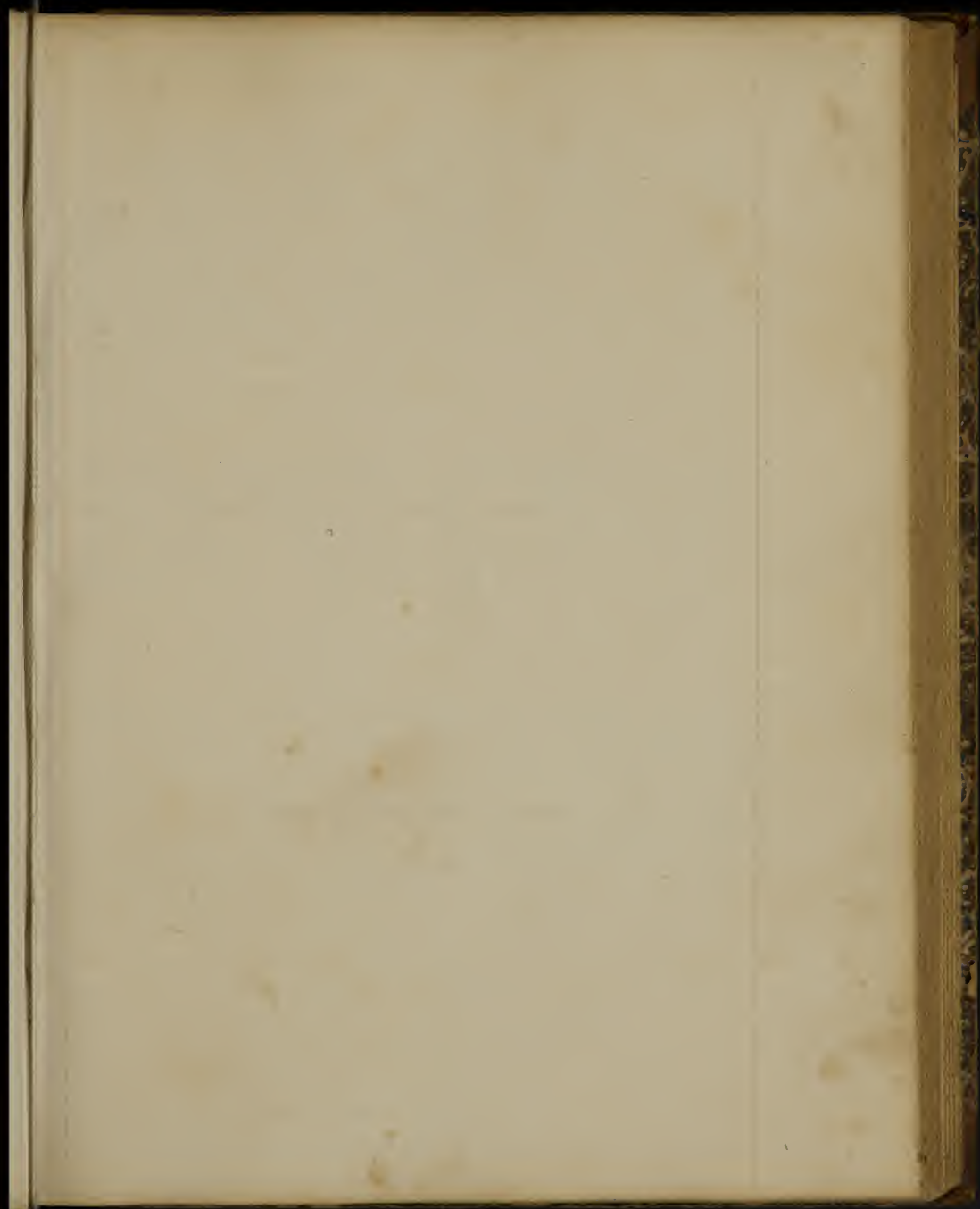
If a debtor absconds, leaving a person here indebted to him (the absconding party) the C. of the absconding debtor may sue the debtor of the absconding debtor.

This defence is founded entirely on statute

See, &c.

There are other defences as fraud & fraud, illegality, fraud to which are treated of in distinct titles.

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Slander

Slander consists in maliciously defaming a person in his reputation and this may be committed either by words written or spoken or by figures & emblems with words and in general any words written or spoken which tend to injure one in any point of personal security connections office profession or interests are slanderous and actionable. 4 Co 14. Bull. 189. 3 Pl 1. 3. Esp 540.

Slander may be committed in three different ways. I By words spoken II By words written III By figures. the two former kinds are in fact by words but slander by words in law means oral slander.

I Slander by words is of two kinds I consisting of words in themselves actionable. & II Words not in themselves actionable but becoming so by reason of some special damage. The latter class consists of any words whatever for any words which injure if maliciously spoken may be actionable, tho' not per se actionable. 4 Bac 413. 474. esp Dig 470.

The rules concerning oral slander apply generally, tho' not universally to Slander by words written. They are to be taken as applying to both except where the contrary is expressed 4 Co 14.

II Oral Slander.

To render words slanderous in law factum & malice must concur, but certain words when false are considered in law of course as malicious.

And malice in the law does not of course mean personal ill will or malevolence to the party complaining, but any wicked or immoral notion is in law malice ex gen If from malice to a man should defame the parent child &c of a man these words are in law spoken maliciously if the parent child &c in analogy to the rule in criminal law. If one intending to shoot at short B he kills B maliciously.

If words are actionable the Plt may recover on proving merely the words spoken. For damage is implied in words in themselves actionable & they prima facie import malice. But sometimes the laxly the presumption of malice may be rebutted by showing that they were spoken under circumstances which exclude the presumption of malice Bull 6. 4 Bac 453. 1st R III. 3 John R 100. 5 John R 508 Starkie on Slander 21 notes.

Actionable words are of four kinds. I Those which bring the person of whom they are spoken into danger of legal punishment II Words tending to exclude the person from society III Words tending to injure a person in his trade, or profession. & IV Words tending to injure one in his office 3 Blc 123. 4 Blc 4. 3. 931

It appears then that words may be actionable which do not injure one's moral character & that words which do injure one's moral character may not be per se actionable.

II Words which charge a crime,
If the words charge a fact which we make one liable 4 Co 15 to corporal punishment. these are clearly actionable in & of themselves.

3 Blc 609

Mils 177. 116 Cro 114

to words which charge a fact which subjects one to banishment & to carting. Rot 36. 4 Blc 416 then to imprisonment for this is corporal punishment also Com C 137. Talk 094. 2 Vent 266. 1 Rot 46. 4 Ann 110 Cro C 315. 8 (Talk 096 contra) 3 Mils 156. (5 John R 191 contra) Stark 41. 2

Held in Com^l that words which charge an offence which subjects one to a fine are standards or not as they are offences ^{involving moral turpitude} perfunctory or not. The English books seem to countenance the same distinction. 2 Com^l R 707. 4 Com^l R 408.

13 John R 124. 275.

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Words with charge a crime.

To charge one with keeping a lewd house is slander per se tho' the offence is merely punishable. But to charge one with an offence punishable by statute with fining is not per se actionable 4 Bl 168. 4 Bac 487. 5 John 191.

11

Exp says words charging a crime with subjects to prosecution are per se actionable but this is too broad. a mere trespass subjects to prosecution. Sid 104. Exp & 497. Cro 39. 4 Bac 485. 7

Words charging an offence with no subject me to punishment must to be actionable ^{must} charge a positive act committed. to say 'he gave I counsel to kill me' is not actionable 4 Co 16 (b) Sid 573. Exp & 490. and where the words were 'I expect to see him indicted for stealing' there were not actionable Hutt 18. again 'I am in jail for stealing a horse' there were not actionable for the construction was he was in jail on a charge for stealing &c but there are suff after verdict.

18051

Hutt 2. Exp & 497. 2 Nels 306 Hardwick R 339. "Solus Il"

merely charging evil inclinations & principles not slander with proof of damage Stark 22:3:41.

adjective words are ~~criminal~~ actionable or not as they presuppose a criminal act committed or not - Ex seditions, cherish traitorous. but perjured is actionable 4 Co 15 b 19a. Exp & 497. But to say 'he is forsworn' is not actionable with other words with imply that it was in a ct of justice &c

But 'he was fawned in such a Ct' is actionable
Cro & Coq. 3 ser 166. 4 Co 15. 1

In Court it was decided that to say one was
fawned in a church meeting is actionable
2 Court R 40. But this was contrary to all
law.

After one has been pardoned for theft to
say that he is a thief is actionable for
the pardon in law extinguishes the crime.
for the fact that he has been a thief cannot
be proved Hob 81. Ray? 23. Esp D 497.

But suppose one sh^d say at such a time I
stole & has since rec^d a pardon, could the
words be justified by proving the truth. I
think he might. he is not a thief but
in truth he has stolen.

To falsely charging one of a crime of which he
has been acquitted is actionable tho' then
words can never subject him to punishment.
4 Bue 487. Owen 150

It is not indispensable then that to render
words actionable there sh^d be actual
danger of punishment if it is inferred that the
words w^d subject one who committed to
to punishment. Stark on Slander 16. 20. 21 many pages

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Words will charge a crime.

Hence it has been determined in Court that to charge one with a crime which is outlawed is still actionable. 14 John R 233

If the crime is impossible it is not actionable to charge it 4 Co 16a Bull N P 5. Ex & 498. Ex I say you killed J. D. when J. D. is actually living. In this case however if the fact that J. D. is living does not appear on the face of the record the J. D. must put it on record by a special plea Bull at P 5. But see Markie 67.8 & 71.2.

If to words charging a crime a description is superadded not corresponding with the crime the words are not actionable. Ex he is a thief, for he stole my timber trees growing on the land. for the offence is merely a trespass 1 Sid. 104. Cro. 674. 4 Co 13. 14. 106a. 2 Nov 12 335. Bull at P 5. Ex at 511. 517. 12 John R. 239.

II Words which tend to exclude the person of whom they are spoken from society. —

This class consists of words which charge one of having the ~~contagious~~ disease. So infectious in its nature and pernicious in its effects, as to render the person afflicted likely to be shunned & avoided. —

3 B & C 55

4 & 6 214

4 & 6 176

2 & 205

Ex p 9408

But the words must charge a present disorder
2 Stra 1149. 2 R 473. formerly otherwise Cro 430
Cro 214.

Adjective words in the present tense are actionable
4 & 13 pious &c. Rollet 248. Cro 124.

Confined ~~to~~ in the absence of proof of special damage
it seems to be promissory & does, reversed —

III Words ^{directly} tending to injure another in his office, business, profession or trade. — to call a lawyer a knave is actionable but to call a physician a knave is not actionable for in the latter case the words do not injure him in his trade
3 B & C 127 2 Vent 28 1 R 652. but want of integrity is a disqualification to the profession of law. — again to say of a lawyer that he has revealed the secrets of his client a ^{trial} 3 Wils 59 he is no lawyer —

To charge a lawyer falsely with ignorance in his profession is actionable Cro 382 & 478. 1 R 297
1 R 127. 1 R 654

same of a physician or minister —

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Words tending to injure a person in his profession?

But in these cases, the Plf must aver that he was practicing that profession at the time but as to the proof it is stated to show that he was an acting lawyer at the time with producing the record 2 Vent 28. Pop 207. 4 Roll.

2 M. & K. 417. So in all cases for words injuring the Plf in his trade offin &c. The Plf must have held the office or exercised the trade &c. at the time of the words spoken for the grounds of the action are either loss of livelihood or danger of loss of the office —

In the same sensibly principle to call a trader a bankrupt is actionable so too words in the future tense are actionable & ex gra he will be a bankrupt in two days.

= But to say of a lawyer or farmer that he is a bankrupt is not actionable for none but a trader requiring credit 4 Co 146.

2 Stra 762. 1 East 330. 1 Roll 61. Esp D 499.

But see 2 Day 495 drover and the cases cited in Stark 118

Charging a trader with cheating customers is actionable for this injures him in his trade so Ray? 1450. 2 Burr 1688. 2 Lev 62.

But in actions by tradesmen it must appear in the declaration by colloquium or in some other way that the words were spoken in reference to his trade or to him as a trader. If the words are he is a cheat then must be a colloquium i.e. it must be alleged that it was said of him in a discourse concerning him as a trader 3alk 194. 20 Ray? 1417. 2 Stra 696. 1169. 5 Colod 395. Ray? 61. 169.

If however the words were 'he is a bankrupt' I think
there is no need of alleging a colloquium concerning Lev 115
him as a trader for the word bankrupt means 250
ex vi termini an insolvent trader. Esp 225. 2 Lev 62
diffely Esp & 588. 514 he has no authority for
this position - So to say 'he keeps false books,' for the words evidently relate to
But if the words were 'he is insolvent' secy. ^{this course of trading}
Holt R 39

The general rule is doubtful by statute where the words impinge
to a tradesman want of integrity Stark 111. 4 Han & Ell. Henry (ll?) 537
falsely to call a clergyman a liar is actionable
for his success must depend on his moral character
Bacon & Bishop in Comm. 15 Dick 244. 'man')

So to call a clergyman a drunkard tho not
actionable as to other persons. 3 Lev 17. 1 Hol 588
Comp 253. Stra 946. 13 Mod R 248. 10 Bin 178. Stark 111

To call a pyccean a quack or to say that Stark 115
he is ignorant of his profession is actionable 7 Conn 257
But to say of a physician that he killed 11 Hol 34
a patient is not actionable. but the Cr & Cro
same words spoken of an apothecary were, 11 Mod 221
held actionable. But I think that these
words charge the physician with mal-practice
& therefore that in all cases they sh^d be considered
as actionable.

As to mechanics vide ----- The rule seems 2 Str 495.
to be that the action extends to words spoken of a
person in any lawful employment ^{in which he habitually acts} by which he may
gain his livelihood - Stark 108:9. 10. 4 Bar 491

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Words which injure a person in his office

2d Ray¹²⁹ Words charging a person in an office of profit
with want of integrity or ability are actionable
if 500 for the tend to destroy his means of livelihood
4 Bac 481. 9 Ellap Rep 262. Dom Clark - 13 Ellap 253 Sheriff - 1 John C 330.

It has been held that

~~But~~ words charging a person in an office of
honour merely with want of ability are
not actionable for they neither impeach
his annual character nor affect his livelihood
But ^{that} words impeaching the integrity of a person
in an office of trust or honour are actionable
2d Ray 129. 4 Co 164. 14 Co 140. 14 Co 617. 2d Ray 1364.

But it seems that the action is sustainable as the law is
now understood in both the above cases. Stark 103:49.

Charging a person in an office of any kind
with the impropriety of principles which disqualify
him from the discharge of his office is
actionable. Bull N. P. 5. To say of such a
man that he intends to usurp the government
is on this principle actionable.

1 John C 129 In many cases, in order to be actionable must have relation to
Stark 111. the official character or conduct of the party charged. as to his trade &c &c
Such cases - When the words do not of themselves import
a reference to the party's official character, but
a colloquium concerning his office, must be
adjudged. The office of a colloquium is
to explain the reference of the words spoken
to some collateral thing to which the words
of themselves do not import a reference
2d Ray 1369. 14 Co 618. 1 Rev 280. 4 Bac 489.

Colloquium

✓ But if the words in themselves import a reference to the plfs official character a colloquium is not necessary his office only must be alleged. Ex he is a knavish justice Cr 155. 1 Lev 280.

✓ When the words are not actionable except as they refer to some collateral fact wht in themselves they do not refer to, a collⁿ is necessary for the purpose of showing their reference. To say of a judge for ex 'he is corrupt' 5 Alld 308. 2 Baund 307. 2 Stra 1169. Exp D 501.

✓ To say of a physician he is no scholar is actionable but a colloquium is necessary. Cr C 270. 1 Rol 524

✓ Where the words were spoken of a trader 'do not deal with him he is a cheat' these 20 Reg 1480 were held actionable without a colloquium.

Where the words were of a trader 'he is a knave' Cr 1240 he has compounded with his creditor a colloquium was held unnecessary. I think incorrectly. Exp D 50

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Innuendo.

If the words do not show their own application to person or subject matter an innuendo is necessary.

Ex 'he is a thief' here an innuendo is necessary for these words are scandalous only as they refer to S. A. if the words were 'D is a thief' here there must be an innuendo 'D' meaning the Plf) is a thief'. Ex again 'He is a thief and I can prove it' alleged in the declaration they 'He (meaning the Plf) is a thief and I (meaning the def) can prove it.
4 Co 17 b

No words which remain uncertain can be reduced to certainty by an innuendo 4 Co 17 b 4 Bac 516. The true meaning is that any thing which taken in connection with all that past at the conversation still remains uncertain ^{to him} cannot be made certain by innuendo. i.e. it can make nothing certain except what can be made certain by a reference to the conversation. Ex 'a certain person whom I know is a thief' now here if it is said in the decl: a certain person (meaning the Plf) is a thief. the declaration is ill on the face of it. the innuendo is bad for the words cannot be made to bear a reference to the Plf — Ex again one of D's servants is a thief. Coupl 684. 1 Rol 73. 4 Co 17 b 706 L. 45. Cro 247. 1 Sid 52. 1 Rol 81. 3 East 427.

But if the declaration was

✓ An innuendo therefore can never extend
the words to a meaning which they cannot
be made in themselves (or by reference to
something before spoken) to bear. *Brown*
Corp 684, 1275. Esp D 511. 4 Co 204. Cro E 534.

✓ Again the words in the declaration were
He stole half an acre of my corn (meaning
~~the~~ corn which had grown on half an acre
which had been reaped) Cro E 418. Corp 684
this innuendo was held bad.

✓ When an innuendo is unnecessary a bad
one is surplusage and the declaration
is good Cro E 609. 4 Bac 576. 1 Roll 83.

✓ It has been held that when the action is brought
for words tending to injure one in his trade
profession or office it must appear by express
words in the declaration that the Def has
at the time of the words spoken in such
trade profession or office. *Hutt* 49. Esp 2515.
Cro E 794. Cro C 205. Cro C 275. *Wells* 159. Cro J 222
Cro C 282. 1 Sid 425. *Wells* 159.

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✓ When the words are used by a trader for words injurious to him in his trade merely, he must alledge not only that he was a trader but that he gained his livelihood by buying & selling 1 Sid 294. Esp & 515.

✓ All our books state that words of heat & passion are not actionable 1 Lev 49. 3 Bk 115. Esp & 520. 4 Bac 532. but words spoken in heat & passion may be actionable. the rule means that offensive terms which are properly words of heat & passion are not actionable. 20 K 335. Ex to call one a rascal & scoundrel &c.

✓ There has prevailed three diff. rules with regard to the construction of words charged as slanderous formally this action was discountenanced & the words were construed in their mitior sense. subsequently they adopted a directly opposite rule. but now the words are to be taken in their most usual ordinary sense
4 Bac 497. 525. Comp 688. 275 Esp & 511. Ides 761.
Buller 4. 5 East 461.

Construction of words spoken

- ✓ When words in an actionable case admit of an innocent meaning it lies on the defendant to show that they were spoken with malice & with an innocent meaning. Peak R 4. 2 Cr R 335.
1 John 279. 3 John 180. - 11

- ✓ One may be guilty of slander by words in another language provided it is understood by the hearers. Hob 126
Cro 865
1 R 674

- ✓ Still the words used at the time in immediate connexion with the words complained of are to be taken together. As he is a thief for he stole my timber they. 4 Co 196a 1 Bull 414 2 Roll 159.
Esp D 511 - Norcutt a poe.

- ✓ It will not do violence to language for the purpose of finding an innocent or a scandalous meaning. Esp Dig 572. Bull 414. - If of a lawyer it was said he is a common maintainer of suits this was held not scandalous.

(188) Construction of words spoken.

The words must be directly slanderous if the slander is to be collected by circumstances & inference then is no slander 4 Co 15(a).

✓ Not where the intent to charge a crime is clear words will be actionable tho' the slander is somewhat indirect. Ex I will make an example for a poisoned Ruaro Bull & P4 Jelv 160. 1 RoL 49. Ex D 72. again I will prove that he poisoned I. O. C 869. 1 Watt 276. 1 Sid 381.

And words in the form of an interrogatory may be slanderous. As when will you return the check that you stole 12 Co 1234. 1 RoL 48. 2 Ro 165.

Slander No. 2.

Justifications - want of malice

✓ Gently words in themselves not imputable from
false imph. malice but the presumption may
in some cases be rebutted. ex where the words
were used in a confidential communication
for a lawful purpose, as where a master is
inquired of as to the character of a servant
here the onus probandi of malice lies on the
Plf. 4 Burr 2422. 12 R 110. Bull & PS. 4 Co 91.
- Exp 110. 3 B & P 57.

ex prof. malice must be proved against the servant in the
above ex p. Stark 229. mere falsity not sufft Stark 400. 401.

So where one by way of warning, confidentially tells
said to a friend of a trader that he will soon go to
be a bankrupt, so business communications, between
persons interested in them are protected Stark 229 3 Wms 291 1 Camp 269.

Words spoken in the course of parliamentary & judicial proceedings
by witnesses, counsel parties, &c. see Stark Ch 10. &c. and see
post next page

The circulation of slanderous words from another
is in gentl slander, but if the person repeating
names rightly at the time of speaking the
words his author, it is no slander. 7 R 17.

The identical words by which the slander was first communi- 2 East 426
cated it seems must also be given. Stark C 13. Bull 10.

x In such cases it is necessary to attend to the
circumstances of the case. If the repeater knows the
slander to be without foundation, or makes use of more ^{originally used} forcible terms, than
(that the deft believed the words spoken to be true)
is no justification tho perhaps it might
mitigate damages. Cro Car 38 Exp 2 575

+ And the rule seems now doubtful & does not apply at any rate
to libel. 5 Carr & P 588 & the case, there cited in a note 2 M & P 695
3 M & P 520.

(199) Justification

When the Deft extorted scandalous words by
provoking the deft he can maintain no
action. Ex Espie you say I am poisoned & so
If you will handle so yes. N. Kan 297.
4 Bac 495. 6 Can & Payne 497.

The truth of the words spoken is always a
complete justification Bull v. P. 8. 9. 1 R. L. 87.
4 Bac 570. formerly doubted as to written slander but
now settled both as to oral & written slander. —
And sometimes the deft may justify tho'
the words were actionable & false. Ex words
in a declaration a count. so in complaints
to a Ct of justice An E 503. 4 Co 14. Hob 52.
5 Lem. 138. 163. Cro E 230. 245. a plea &c

Stark 109.

But where legal proceedings are made
a colour for slander &c the slanderer has
his remedy by action for malicious pro.

It has been held that slander will lie where
the Ct before whom the action is bro't has
no jurisdiction, but this is now denied
4 Co 14. Cro E 230 & C. Hob 206. 267. 1 R. L. 34.
Esp D 503. (1 Hawk 131. c 73. ss. 1 dauid 132 (n1).
Cro J 432. 5 Esp 109. 110. (a). Stark 192:3.

Justification.

The person complained of in a ct may justify saying that the deft has sworn falsely for this is by way of defence in a court of judicial proceeding 2 Burr 107. 1 Rolt 17 4 Benc 499 578.

Again a party to a suit may say that a witness has heretofore perjured himself by way of objection to his testimony & the words are not actionable. 11 Ann 132 1 Rolt 17 Leon: 138

163.

So words used in a complaint to a grand jury or to a proper magistrate as a foundation for a public prosecution are not slanderous. Cro E 147. 40 b 82. 4 Co 14. 3 Esp 32. 2 Wms 515 Stark 189 note;

But if one maliciously complains to a grand jury he is liable to an action for malicious prosecution, not for slander.

again where words charging crimes are used in a petition of redress of grievance they are not actionable 1 Saund 131. 2 Burr 810. 811. 5 Esp 110 pt.

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Justifications

Words spoken in the House of representatives by a member not actionable if pertinent to the question. 5 Cowles & Collins in Court, 4 Mass 1

Words used by one of defense by a party accused before a church presbytery are held in Penn not actionable. 1 Binney 178. 5 Esp 110 n. 1 Binney 186. 3 John R 180.

Words used in pronouncing the sentence of a Ct martial are not actionable.
2 A R 341

Slandorous words spoken by a witness in a Ct of justice are guilty, not actionable, but if the witness goes beyond the issue & slanders third persons he is guilty of slander
Cro & 235 Gatt 11. 2 Bul 269. 4 Co 14.
Esp 504.

So also between two contradictory witnesses if one contradicts the other & says that the other has sworn falsely no action lies
1 Saund 131 2 Burr 807. and (26). 5 Esp 110 n.

So that the words were spoken by the defendant in a cause is often a good defence
in 191. Bull N P 10. 5 Esp 110 n. 7 Cow 75

Justifications.

On this subject the rule is if the words are pertinent to cause (and as BC adds suggested 3 Bl 17 by the client) the words are not actionable Cro 90. I think the circumstance of being suggested by the client can make no difference.

But if the words spoken are impertinent the words spoken are not justifiable tho' suggested by the client. 3 Bl 24. Cro 90:1.

Stark C 12.

Stark considers the suggestion by the client as important.

Held in one case, that for the purpose of mitigation of damages the counsel might use scandalous words not pertinent & in a later case it is held that a counsel is never liable for scandalous words. but I say no propriety in either of these rules & our modern writers take no notice of either of these cases. 4 Bl 328
4 Bl 462
4 Bl 491

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Declaration

in declaring for slanderous words it is usual to state that the words were spoken publicly & maliciously but the allegation that the words were malicious is not to be necessary at least after verdict 4 B & S 12. 15 and 24 and 1 Ch 173 Lord 5.

But see
Ct 156

But this rule applies only to words in themselves actionable there it is not to be unnecessary because the falsehood makes the words prima facie malicious but this rule is opposed to all principle.

The Def. usually pledges his good character but this is unnecessary.

It is necessary to pledge that the words were spoken in the hearing of other persons or something equivalent as that they were spoken openly & publicly or that they were spoken in the presence of other persons in C 46. 156 57. 4 B & S 12.

When there are two counts in one of which the
wads are actionable and the other not & a
general verdict is given judgment may be
arrested & a new trial awarded. If ^{however} several
damages are awarded the Plf may enter a
remittitur on the second count.

15 R 534. 15 R 532. Stra 1094. 15 R 225. 3 Mo 177
10 Co 130. 1. This rule has been reversed
in Court. In this State judgment is not arrested if any count
is good.

But if in count containing some wads which
are actionable & other not & an entire
verdict given judgment cannot be arrested.

The verdict is presumed to be founded on the actionable
wads.

In actions for wads not in themselves action-
able the declaration must allege special
damage & the special damage must be
proved for the special damage is the gist
of the action. 15 R 130. Bull v P 67. Esp 202.

When the wads are in themselves actionable special
damage need not be alleged but the Plf
may allege & prove special damage for
the sake of aggravating damages but he
can prove no other special damage than what
he alleges. Bull v P 7. Esp 202. 15 R 130.
1 R 58. 1 Camp 428. Stark 402.

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Declaration

But it has been held that where special damage is necessary to be alleged the Def may prove special damage not alleged but this is not all principle - the Deft cannot be presumed to come prepared to meet special damage not alleged & this rule is contradicted in the books. Stratford v. Collet 27. Esp. 526. analogy see to be found in Waddington v. Maitland 1840.

It is no matter what the words are if they are false & malicious & have occasioned special damage. Incontinence or ora if not per se actionable but if special damage arises they are actionable & Co 17. & 13 ac 476.

There is what is called in our books the slander of title as by calling an heir illegitimate those do not appear per se actionable but yet a recovery can be had in moving until & probable damage whereas in the cases, actual damage must be proved. Co 17. 213 & Co 17. Esp. 521. 1 Rol 38.

and it has been held that this action is
lie in favour of a younger son & Co 17d
Esp & 501.

But no action lies for slander of title if the
defendant claims himself to be the next heir
Ex Younger son, that the elder son is
illegitimate for any one has a right to
claim title & Co 17. Esp & 501.

Pleadings on the part of the defendant
The general issue is O.T. and under this issue
the defendant may contend that he did not
speak the words or that they were spoken
without malice. for want of malice makes
the words not actionable & malice is of
the gist of the action 10 R 110. Bull & 18.
Lev 52. Esp & 501. 577.

It is not sufficient to say that the defendant
was not the next heir. He must show
that the general issue comprehends all
defences except such as arise from some
act of the plaintiff amounting to a discharge
but by a rule of practice if the defendant
justifies under the general issue he must give notice

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Pleadings by def^t
on a Verdict the same.

In some of the Plt's jury has gone character
to that species of crime, like he is charged
with in issue and this gone character
goes in mitigation of damages. This
rule has been established by immemorial
usage 1 Root 450. 324. 4 Stark R 32.

General gone character admissible in agg^t of
damages 7 Conn R 35.
No such rule was ever adopted in Engl^d
until very lately. and the gone rule is
adopted in the US courts. 10 Mass R 284.
2 Campb 257. Peck Ev appx 92. (1 John 46.
6 Callap 578. 1 Ph Ev 140. (a) For the rule in New York
see 1 John R 46. 7 Cowen 613. 5 Conn 409 2 Cow 811 —

But the def^t in mitigating damages can
not prove that the Plt has been guilty of
an act similar to that charged. If he
has stolen a horse now here the def^t
cannot prove that Plt stole an ox. But
def^t may prove the Plt to be reputed a
thief (Crompton 1807 Atwood v Atwood. 1 Ct)
Bull Ct 296. Peck Ev 2.

Again the Deft in impeaching the Plff's
moral character must confine himself to
that trait of character which the words
charge. If the Deft said he is a perjured
man he may prove him to be a notorious
liar.

But if the words were he is a thief he
may justify by showing any specific
act of theft & this not in mitigation
but in bar of the action (2 B).

By C a special justification can now be
given in evidence under the genl issue.
If truth must be pleaded. 4 Co 16. 5 Co 125.
Exp & 578. Stra 1200. Long 373.

and at C if the deft does not plead the
truth of the words he cannot prove their truth
even in mitigation of damages. (See the
cases not used with analogy) Stra 1200.
Exp & 578. Bull & P. q. (conting) 4 Conn: R 408.

As the truth can be pleaded it must be. -
But it seems that matters short of actual proof of John R 46
guilt, tending to prove the truth of the words spoken Gillett R 514
and exciting strong suspicion are admissible in 3 D 546
mitigation - these circumstances cannot be pleaded 14 D 274
and damages Stark 405 to 410. 4 Conn: R 408 1 Pick 81.
7 Green 613. 6 Carr & Payne 2175.

(200)

Readings by text

The recovery of damages is a bar to any other action for the same wrong whether the wrongs are per se actionable or not and this holds even where subsequent special damage arises. Bull N 27. Exp D 519.

Formerly necessary to prove the wrong precisely as alleged, & but now suffice to prove them substantially 2 R 6718. Bull N 25. Exp D 521.

But the style & manner must be the same 5 R 157. 4 R 217. Exp L 521. -

A distinction was formerly taken that wrongs which were actionable could not be given in evidence to show malice but this distinction is now overruled.

When wrongs are given in evidence which were said at a former time the defendant may show that the wrongs were true to rebut malice for the law does not impute malice (Bull 10 Exp 521) where the wrongs are true -

The wrongs thus given in evidence must impeach the character in the same respect Exp D 518. 520.
Bull 10.

The English St of lin^{rs} requires the action to be bro't within two years. but this extends only to words which are in themselves actionable 1 Stra 95. 1 Will 95. Esp § 519.

As a civil rule a joint action of slander by a set of two cannot be bro't. Bull 4 P. 5. 2 Barr 484. Esp § 504. 3 Bl 117. 9 Lr 120. 1. (Rule differs as to libel, quodammodo the diff.).

But two partners in trade may sue jointly for words spoken of them as such where the words produce a joint injury 3 B & P 150. 2 Selw 1162. 2 Saund 1174. But it is left doubtful in the books whether if the words are per se actionable the partners may join as that they are bankrupts but without doubt a joint action in such case will lie for the law here presumes a joint damage (26)

Libel. Whether words be actionable if spoken are clearly so when written 3 Bl 126. Esp § 540. But written slander is considered as of a more aggravated kind than oral. it is committed with deliberation &c. 3 Bl 126. 3 Barr 444.

Hence the first rule does not hold & converso. There are many loose rules on this subject in the books. Esp 504. 3 Bl 126.

(202)

A libel is any malicious defamation of any person dead or living published by writing or printing & ~~intending~~ to excite resentment in the party or tending to expose him to dishonour or ridicule &c. 1 Hawk 143. 4 R 22. 4 B & 150

3 B & 490

But part of the law holds only of libel as a public offence viz 1st the libel of a person dead & 2^d that tending to produce resentment.

all libels include a public offence 3 B & 125.
3 B & 492. 498 'the libel'.

The gen^l rules concerning words spoken apply to libel considered as a civil injury. this rule holds thus far that written words falling within any of the four kinds of actionable words are libels but this is not true & converso. 3 Wils 403. 3 B & 126. Esp & 504.
3 B & 598.

It is also true that those circumstances which will justify words spoken will in gen^l justify them when written so far as the civil action is concerned 12 W 107. Esp & 505.

And an action will not lie for publishing a true acct of a trial in a Ct of justice of the testimony of a witness which may be false & contain actionable words for the proceedings of a Ct are open 1 B & P 25. 12 R 456.
5 D & 110 (n). 8 R 293.

In a civil action the truth of the words written
is a justification 15 R 748. 4 Bl 150. Hob 253.
2 Allod 166. 11 do 49. Bull. 1 P 5: 17. (4 Bac 516. 3 Bac 495)

But on a crim^t prosecution truth is no justifi-
cation at, &c for the pros^t is lost for the
sake of the public. for its tendency to a
breach of the peace. 5 Co 125. Stra 490. 4 Bl 150.
3 Bl 125: 6. 2 Allod Val 640.

It is the bad reputation of the person libelled
a justification. 7 R 4. 2 Allod Val 649.

We have a stat in Count that the truth of
words may be a justification in a public
prosecution.

A libel must be published. originally writing
at another's dictation is a libel 10th 405.
5 Allod 163. 2 Allod Val 642.

Merely transcribing a libel witht showing 9 Co 57 (6)
it is no publication, but if it becomes public 10th 419.
public, tho not proved to be published by the transcriber the transcribing is then a publication. Esp 570.

But composing & reducing to writing a libel is
clearly a publication tho he locks it up in
his desk & it becomes public witht his consent
So procuring a libel to be written. reading
it after a knowledge of the contents. handing
it to another. sending it to another.

affixing it in any public place & in that to be wilfully & maliciously instrumental in making it public incurs the guilt of publication. 1 Cr 761. 5 Co 125d. 1 Hank 195. 2d Cr 570. 2d R. 341. 7alk 410. 2 BCR 1038. 2d Cr 4643.

Putting a bookeller on the sale of it by his clerk without his consent is a publication & the sale in his store is prima facie evidence of a sale by himself. 2d Cr 644. 5. 5 BCR 267. 2d Cr 510.

If a libel is published in a printing office this is prima facie evidence agt the Editor. 2 BCR 1038. 2d Cr 633. 647. 5. 2d Hank 131.

Sending the writing to the press is a publication. 2d Cr 576. Fontaine 201.

Signifying the libel is a pub^l. 2 BCR 507. 207. 5 BCR 266. 5 Co 125d. 2d Cr 510.

But repeating part of a libel in conversation is held to be no pub^l but the absence of malice must be very clear. 1 Hank 196. 2d Cr 443.

Writing a libel & sending it to the party libelled is a pub^l for the purpose of a crime but it will not support a civil action. 4 BCR 150. 1 Hank 195. Popph 139. 12 Co 35. 1d Cr 58. 4th 62. 215.

2d Cr 526. writing a letter by way of private expostulation may hold a sufficient ground for public pub^l but they must depend on the circumstances. 2 BCR 151.

Trove (11)

This action originally lay only in cases when one found the goods of another & refused to deliver them on demand, & converted them, 3 Bl 152
5 Bac 256.

(It now lies in many other cases)

The action is derived from West. 2^d, 13 Ed 1st. It now lies by fiction ag^t any one who larcinously takes the goods of another 5 Bac 257. Cro E 524 Bro 750 doubled exp 589. 1 Cl & 31. Stra 12. Forbney not so. In those cases the force & arms are waived in point of form otherwise an action on the case would not lie.

And in genl in all cases, in whh one who is by any means possessed of another's personal goods, sells them, destroys them, or uses them right right, or wrongfully, refuses to restore them on demand, 3 Bl 153. Bull 33. Cro E 781.
5 Bac 256. 7. This action lies.

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the first instance of this action in its present form was in the reign of Ed. VI. but actions of a similar nature were b't in the reign of Hen 8th. the fact of finding is now immaterial conversion is the gist finding guilt, stated in Encl., not always not indispensable Esp 517. Bull 33. 5 Bac 295. 172. 2 BL 313. For the manner of obtaining posn is now but inducement. finding of course not traversable. but debt may deny under the guilt issue that he ever had possession of the goods

Guilt definition of conversion. the wrongful assuming the disposal of the goods of another as if they were his own 6th ed 212 5 Bac 257 2 Bull 200. Sid 264. — therefore it is a tort. the debt is by the form of the action always supposed to have taken possession lawfully 5 Bac 256:7. Cro 50. 1 Bac 31.

Conversions

The gist is the conversion & this may consist 1st In an unlawful taking & In the unlawful use 2^d In an unlawful detinue. The evidence of conversion in these cases are diff. To constitute a conversion there must always be a misfeasance. Exp D 590. 5 Bac 288. 257. 1 Roll 6.

I A tortious taking is per se a conversion in law. no demand necessary. Exp 587. 5 Bac 257. 1 Sid 264. 25 R 465. Exp 580. 3 Wils 146. Trespass in such cases is concurrent & is founded on the fact. Trover waives the fact as such i.e. it waives it ground the form of declaring but is founded on it as evidence Post. 1 Bac 41.

II By unlawful use they suppose, de facto, lawful ex using a thing found to 5 Bac 257. 1 Pl 221. Cro E 219. For this is an unlawful assuming to dispose of the goods of another as if they were ones own 5 Bac 257. Where the taking is not tortious there must be some evidence of an actual conversion as vide following ex us— Exp 580.

(208)

Conversion

Collapsing prop entrusted to ones care found
to 1 B.C. 221. If carrier of a box of goods
breaks it open & sells the box to 2 B.C. 655
2 B.C. 312. 2 B.C. 753.

So destroying them as throwing paper found
into the water Bro 219. 3 B.C. 153.

So by selling them B.C. 131. Comp 419. 2 B.C. 444
1 B.C. 87. 6 B.C. 697.

But if carrier of goods destroy them responde
is said to be concurrent with trover
Co Litt 57(a) 5 Co 13(b). 2 R.L. 555. 5 Comyn D
581. cited 248. The bailment is
extinguished by so wanting an act. vide
Bailment. According to Coke it shows
an original intent to destroy them &
so makes his possession ab initio

Drawing out part of a cask of wine & filling
it with water is a conversion of the whole
Co 531. 1 B.C. 221. Sta 576. This is a wrongful
opening to at safran

Conversion

But neglecting the custody of a thing is no conversion Esp 580. 590. But a misfeasance 406 281. 5 Co 142. 24 finder of cloth suffers it to be moth eaten. So if perishable articles are suffered to decay Crof 214. 20 R 129. 1 Bar 48. 1 Pm C 252. Jones 252. 20 Rhy 417. 5 Bar 258. 406 17. 1 Balc 165. 143. 1 Rol 2. 5 Bar 2827. 1 Bar 243. 5 Bar 269.

Special action in the case here lies Esp 590 Balc 655. 20 Rhy 417. Pm C 252. Jones 48. Esp 581.

If carrier loses the goods, trover lies not Balc 655. No misfeasance. When liable to a loss for neglect misfeasance or the act of a stranger case must be lost.

As timber being on B's land & asked leave to take it B refused trover was held not to lie no conversion. no intermeddling. no misfeasance 5 Bar 29. 259. 2 Bul 310. 2 Roll 245. 5 Bar 174. 3. 2 HBC 257. 2.

Where the conversion consists in selling the property of another in debt as is concurrent with trover (Bul 131. Comp 419. 2 R 144. 1 Do 357 60 R 697) to receive the money, it sold for.

(210)

Conversion

III Wrongful detainer is a conversion as if bailee refuse (wrongfully) to deliver on demand.

If there has been an actual conversion as by use to demand & refusal, an unnecessary to the right of action Esp 590. 1 Red 264.

In arg to this
Example
in Dig.
537

But a refusal to deliver on demand is not itself a conversion for it may be justified. 1 Ex. P. does not show suff^t evidence of ownership at the time of the demand. Esp 590. 2 Pal 312. Comp 529. 1 So debt may have a lien on the property as innkeeper carrier &c. 2 Show 161. 2 L Ray? 752. Esp 552. 2 Bun 935. 4 Bun 221. 29 It may have been destroyed with debtors fault a lost or stolen sack 655. Esp 590. 5 Bun 282. 20 Ray? 752. 1 Lu C 537.

Demand & refusal are therefore only evidence of a conversion Esp 590. 1 Red 131. 5 Co 50. 2 Show 179. 3 Bl 53. Holt 187. & per se only prima facie evidence 10 Co 56 (6). 5 Hal Esp 590. 2 Bac 243. 2 H Bl 135. 6. denied 6 Mod 112. Moore 666. Comp 529.

But if the refusal is not justified by law
the presumption becomes conclusive evidence
to the jury of conversion

But if jur. find only demand & refusal
Court cannot give judgment for plaintiff
10 Co 56. Bro & Ry 495. 3 ^{Man} 1243.

This will be a special finding but imperfect
and a venire de novo will be awarded.

It has been doubted whether the finder may not keep the goods until his expenses &c are paid! but it is now settled that he cannot: 2 HBL 254. 2 BLR 1117

It seems however that the finder (in Conn. by Stat) has a lien for his charges. Statute of Conn. title stray -

Where a servant converts goods even for the use of his master by the command of the master the servant is liable in trover

1 Wils 328. Stra 813 Bull N P 47 Esp D 580

Who may maintain this action.

In genl any one who has an interest in goods converted the Plf need not have an absolute property 2 R 569. 1 Sid 348. Latch 214. Ex Bailor in genl may have this action w^t him who converts goods in the hands of his bailee -

But if the bailor had not the right of possession, at the time of the conversion yet no. 4 R 489. 13 R 480. 8 John 432 2 Ch P 329 (w) 8 John 432 11 John 355. 2 PH 1334 It is said

Who may maintain this action
Again the bailee has this action & I think
that every bailee in all circumstances is entitled
to this action he has a lawful possession
1 B & P 44. 2ak R 40. 3 Esp 140. esp D 577.

A common carrier special carrier. a posting
farmer &c &c may have this action agt
the wrong doer.

If goods are sent from A to B not to rest & R 215.
in 113 495.

Shff who has taken goods in Ex'n can have
this action 1 Lev 202. Bull 33. 2 Saunders 47 (u).

Indeed a mere lawful possession or a claim
of right with actual possession gives this
action agt a wrong doer.

Hence finder may have the action agt
one who unlawfully takes them 16. Stra 777
505. 2 Saunders 47

(214) Who may maintain trover.

A rightful possession always implies an interest a special interest at least. & a special interest is all that is necessary

But this possession must be acquired either really or under colour of title & claim of title. 4 Wils 338. 2 Saunders 474 n. A possession acquired with right & with colour of right gives no special interest. & that can maintain no action of trover.

Is a right of possession at the time of the conversion is sufficient tho' without actual pos.
1 Buls 6. 1 R 480. 7 R 9. Esp D 576.

But a property of some kind is indispensable
Ex Ppf had sent an order to deliver goods
Jalk 18 to his servant & the merchant d: the goods
Bull 1356 to an innkeeper. here Ppf had neither pos
3 P W 116. nor right of pos. seems if the goods had
Esp D 576 been d: to the servant.

Trover is founded on prop^y in the p^l
trespass is founded on p^ossⁿ in the p^l. but
as ag^t a stranger whose original p^ossⁿ is
tortious the distinction does not pract-
ically apply

The distinction holds in practice only
when the def^t's original p^ossⁿ is
lawful here trespass will not lie unless
in case of a wanton destruction of the
property &c for the def^t's p^ossⁿ is
lawful but trover will lie

An uncertificated bankrupt may have
the action ag^t a stranger 1 B & P 44.
Peak R 140. 3 Esp 140. Godt 569.

At C 2 Ex^{or} could not maintain the
action for goods converted in the life Cr 6377
time of the testator. but by 4 Ed 3? Ex^{or} 579
de bonis asportatis. the action is given Stra 60
to Ex^{ors}. vide Ex^{or} 1 & 4 Ed 4. 2 called 168

(216) Who may maintain trover
For the rules respecting bailors & bailors
vide Bailment.

called 212 In genl the returning of the goods to the
Croff 145 Plf after conversion does not bust the Plf
65 R 696 of his action but merely goes in mitigation
2 Bl R 402 of damages.
Exp D 551

But if the conversion consists in a tortious
taking, & the deft delivers the goods, or dems,
and the Plf receives them, the Plf loses his
action, for in trover the unlawfulness of
the taking is waived, & the only conversion
is the taking, & the subseq^t receiving of
the goods destroys all damages. But in
this very case the prop is lic. 1 Bin 81.

When the owner recovers in trover the recovery
vests the prop^y in the deft except when
the prop^y has been returned Stra 1078.
5 Bac 257. Exp D 593. 1 Shon 146.

questioⁿ whether a conversion is made by
returning the goods to the owner.

if former recovery of judgment not a discharge
for the same cause is a bar to a subsequent
action. Plt can have but one judgment.
Crof 73. esp L 593. Stra 1078.

This rule is common to actions soundly ^{unless the}
in tort generally. in contract judgment ^{with} ~~without~~ ^{the} ~~contract~~ ^{may}
satisfaction not be ^{not} ~~the~~ ^{the} ~~action~~ ^{may}
another. (H) Sed qua will ^{judgment} ~~with~~ ^{satisfaction} ~~with~~ ^{can}
bar any action vide Yelv 68 (m). edit of Maitland 1820.
3 East 258. re. ^{judgment} ~~the~~ ^{may} ~~the~~ ^{the}

Again - where trover & indebit ass. or where
trover & trespass are concurrent &c a
recovery in any one form is a good
bar to any subsequent action in the different
form. 2d Ray? 127. 5 Bac 280. esp L 593.

(218)

Ag^t whom the action lies?

It lies ag^t the first wrongful taker &
ag^t any subsequent holder who is bona fide
purchaser provided the goods were not sold
in market overt. *Miles 1 Wils & Jack 283*
4th 44. 5th & 574.

The exception regarding market overt is
not known in Count. But in Engl: the
sale in market overt is not good
unless it was a bona fide sale —
2 Bl 450. 1 Leon 150. 5th & 574

Again where the subject is money, a
bill of exchange transferable by delivery
bona fide purchasers are protected. this
is founded on commercial policy.

Miller & Race 1 Burr 452. 7- Jack 126.
2d Ray 738. 3 Burr 1516. Doug 611. 1 Bl R 485.

A bailor gets if goods with delivery does
not vesting property in the donee & if
he afterwards takes prop^y with consent of
the donee he himself is liable in trover.
Exp 677. 1 Burr 299. 2 Leon 30. As to the
last proposition the donee must demonstrate
the prop^y - for the gift aint to a licen^{ce}
which will justify the taking.

But what is called (improperly) a symbolical
delivery is sufficient. Ex delivery of the key of the castle
a trunk in which the goods are. 1 East 192

which in some type tents cannot maintain
this action against each other. 290.
12 R 658. Cowp 450. 1 Day 301.

But if one such tent wantonly destroys the
prop the other may maintain the action
for this cannot be deemed the act of both
Co Litt 102 (a). Exp D 506. 1 East 368. 368.
Bulles A 334. q. 3 John R 175.

What time lies for.

For any personal chattel in jail - for choses in 2 Co 162 a 190
action, & in this case the date need not be mentioned. Bull 130

243. 654

27 R 708

Cowp 117

Exp D 543

Str. (Co 1723)

It lies also for a title deed Exp D 543. 27 R 708.
q. 110.

(220) For what trove lies.

But in gen^l it will not lie for an animal
for a nature unly confined & of value 4 Bl 235.
1. RoL 5. 406 ~~289~~. CroE 125.

When they are in their wild state of course we
 can have any mus. in them. (Sk.)

But for tame animals this action will lie proper
5 Bnc. 264.

Quare - Will Hoover lie for a dog?

But this action does not lie for a negro slave
+ this was decided before Somerset's case for as
regards his person no one has a right to it
the master has only a right to his perpetual
services. The action in such case must be a
special action on the case with a hoc quod.
10 Ray. 146. 1274. Carth 397. 2 Lev 201. 3 Lev 836.
3 Feb 755/.

Again this will not lie for the conversion of a public record. the record cannot be private propy. but the copy of a record may be private propy & thovser will lie. *Hard. 110. Exp D 542. 5 Bnc 264*

usually held that trover w? not lie for money
unless in a box so. but this is not now law
(Cro E 635. 681.) 57 Rep 264. 11 Rol 5. Cro C 59.
Cro E 818. 841. (Lemay Q 325. VE) 1 Chk 284
Muller 35. 130.

Trove (142). (4th & Battery No. 1).

For what things it lies.

But trove lies in the commission of personal chattels,
only. Hence the seizure of a thing from another
possession is not a conversion of it. Trespass must
in these cases be not "his held of all fixtures."
Cro. 129. 5 Bac 257.

So if one cuts & carries away with one continued Quere vide
not timber trees. trove will not lie. 15 Map R 204

But if one tortiously takes a thing already
seized from the possession the formerly affected
to it trove will lie. Cro. 125. 5 Bac 257. Thus
if I seize trees on one day & carry them away on
the next trove will lie.

If the goods of a freighter ^{are} thrown on board
to save the ship trove will not lie 2 B. & S. 250
57 Bac 258. The receipt is a justification.

But he whose goods are thrown overboard in such
case is by the maritime law entitled to average

(222)

Pleadings.

Cro E 78

Ex E 581

2 R 36

Some plea for the commission must be alleged
but this is now to be upheld only by
specific denials seeing formerly.

The Def must allege properly in himself that
III. 5th E 71. 12th 123.

It is common & almost universal to allege a demand
& refusal but this cannot be necessary & even when
the action will not lie without a demand &
refusal there need not be stated for this
is merely evidence of commission.

The time of the commission must be alleged
the time of or finding are generally stated but
this is not necessary — the omission of the
time of commission is now more matter —
form. formerly otherwise —
Went 135. Cro 7425. Cro E 97

The prop. converted must be described with
consequent certainty formerly the rule was
much more strict. Went 1146 507. Ex E 587. 8.
2 Ray? 99. 588. 1. 200. 200. 176. 176. 176.
13th 61 237. vide Wright

Exp, says the Def need not state the value of the goods but some value must be alleged tho it need not be a true value. But the omission of value is aided by statute. Exp & 578. 2 Lev 430. 5 Bac 275. Exp & 407.

Defences.

It is said that a release is the only good special plea in bar 1 Lev 355. 5 Bac 276. Exp & 592.

But other special pleas have been allowed (exp & 77. Stra 107. Salk 604) and ought to have been allowed. Ex fama judg^t stand & satisfaction of limitations.

One rule is that a justification cannot be pleaded specially for to plead a justification unto to the genl issue. conversion ex vi termini means a that nllt cannot be justified a justification denies the conversion. Bull 48. Exp & 593. With this exception special pleas are as good in trover as in any other action.

We know no limitation in terms for the action of trover. but when trespass & trover are concurrent trover is within the spirit of the statute relating to trespass but we do have held contra.

(224)

Assault & Battery.

An assault is an attempt or offer to do a corporal act to another with force without actually touching the body, lifting a club, brandishing a sword, pointing a gun &c. *Comyns & Matthe*
3 Bl 120. Bull & P. 5. Exp D 312. 1 Hawk 133.

An assault is called an inchoate violence & is a wrong even tho' no actual hurt is sustained
3 Bl 120.

But to make any threatening act an assault in law a hostile intent must accompany the act. Ex. A took his sword & brandished it & said if it were not against him I would not take such language - *10 Mod. 1 Bac*
154. 10 Mod. 137. 2 Roll 545.

But a battery cannot be thus explained by words.

Famously held that threatening words might make an assault. *1 Hawk 133. 4. 2 Roll 545. 1 Bac 154*
but not so now. -

of battery consists in the actual doing of violence to another & the least degree of violence if done in an insolent & angry manner is a battery. When the violence is merely nominal the manner of committing it decides whether it is a battery or not. but when the violence is not merely nominal the manner cannot make it less than a battery. See 149. 172. 1 Hawk 134. 1 Bac 154.

BL says that battery is the unlawful beating of another but this is incorrect the word battery does not ex vi termini mean an unlawful act. 3 BL no.

Every battery includes an assault so that proof of a battery will support the allegation of an assault. 1 Hawk 134. back 314.

Menaces of bodily hurt are in some cases actionable injuries tho they cannot amount to an assault. where they occasion an actual damage they are actionable the special damage is the gist of the action. The action is however trespass vi et armis tho it ought on principle to have been case. 3 BL no. Comyn & Bat 344. 2 Rol 545.

For what injuries - Assault & Battery lies.

To entitle to a recovery for a battery the injury complained of must have been the immediate effect of the force employed. Ex the master's action for an injury to his servant should on principle be case - is indeed in fact case tho in form it is strict assumpsit. vide Trespass on the case.

But the injury need not have been instantaneous if the injury is produced by a direct chain of causes & effects it will support Assault & Battery.

PARKE 403. & B & R 16. 313. ^{supra} 634. Ex standing with a sword here the injury is instantaneous. but if A throws an elastic ball & it bounds & rebounds until finally it injures B here the injury is not instantaneous but it is sufficiently immediate.

If A pushes B. & C. C may have Assault & Battery agt A. Bull 4 16. 313.

If a horse with a rider upon him takes a sudden fright & runs agt A. the rider is not liable in strict assumpsit for he is not the cause of the battery.

But if one wantonly sticks a horse or a bull 4 Allod 405
if A is riding & injures B or A.B. the person sticking or 505.
is liable in strict assumpsit to A. & A.B. this is on 1 Allod 24
the same principle as the bull (supra). Bull 637.
contra but entirely incorrect. the horse is an Exp D 313
mere instrument. just as if one shot at a stone Bull 10
in motion down a hill &c. 2 East 503. 3 Nib 304

(228)

Excuses for battery & consent

If one turns a mad bull to into the street & injury is done to any person Ass't & Battery
lies, L. C.

When one receives bodily hurt from an act to which the party injured consents, he is in some cases entitled to no remedy - The distinction in the books is that if the consent is to an illegal act the action lies Exp D 313. 11 Nov 174
Will & P. 10. 2 Nov 174. This distinction is derived from a statement in Combertach 876. -- 218.
ex If a man agrees to play at cuggles with B & is injured he has no remedy for this is lawful but if it were boxing, scut for boxing is unlawful - But I think that this distinction applies only to an indictment & that the party injured can in such case never recover volenti non fit injuria and where the act is illegal he is participant crimines -

It is again said that if one gives another
authority to commit a battery, there is no Public Policy
justification. But I think that the injured party cannot
have his action there as
intent must will in such case with consent, 127
lie.

It is not necessary for the maintenance
of this action that the injury sh. be willful.
If committed thro negligence intent must
will not lie, but a strict action will;
a damage is committed to the person
suffering it must suffer rather than the other.
2 Bl R 96. Ray 468. but the intent will
always have an effect on the amount of damages

Hence an idiot, lunatic, child 14 years
is liable strictly for a battery. one instance
not a child of 4 yrs of age. Lat 13. 110.
Long 440. 406 134. 115 on 6101.

(230) Excuses for battery

Nothing less than inevitable ^{accident} will excuse one who by his own act has injured another person
3 N.H. 377. 406. 134. 2 B.C. R 596
2 N.H. 410. 1 Tra 596. 1 Tra 181.

Inevitable accident is that not all human strength or care cannot guard against it is pushed up to it is not liable or it taken with a fall falls upon it.

If then A firing at a mark, hits B. A is liable 2 B.C. R 596. Ray 407.

Buller says if a horse used to running away runs away with the rider & injures another the rider is liable for he is imprudent & negligent, but here I think that the rider does not commit the battery, & that the action should be case Bull N.P.C. 11 N.H. 295.

If the act causing the injury is voluntary & not Battery, but the injury is not voluntary. But when one is without acting for himself becomes the involuntary instrument of injury to another in guilt he acts as a lie, but none of it & Battery.

Some have supposed that where the act causing the injury is lawful & where there is no negligence est & R does not lie. But there is no authority for this rule Est & R 199.

317. 313. Bull at P 15. 6. See 478. 9. - (If however the injury is such that an action on the case must be brought the def is not liable if the act is lawful, in general, unless the def is guilty of negligence or malice. Suppose however the act, causing the injury, is not only lawful, but one which it was the duty of the person doing to perform, and the injury is purely accidental. Hol 138. See 478. Bullen NP 16.

But Est says a trespass of any kind to be actionable must be voluntary but they cannot be law he cites 4 Murr

but he has wholly mistaken that case in that case the injury was to deer from the def's dog here the act is not the act of the def unless the def was guilty of some neglect

Where the act causing the damage is itself unlawful the author of it is in some way liable for all the injurious consequences but in what form vide trespass on the case the circumstance that the act is illegal makes no difference with the form of action it is no criterion at all the form is determined by the circumstance of the injury being the immediate consequence of the act & one a not. 213. 199.

(232)

Cases in which battery may be justified
An Off having a process of arrest
may use all necessary violence even to
the taking of life 1 Hawk 130. Exp 314. 1 Bae 155.

But a battery is not justified on a mere right
of arrest unless actual resistance is made
unless the Off attempts to escape with
these the Off may merely use military means
imposed. 2 Stra 1049. Do. Ray? 229. Bull 18:14.
Exp 314. 17 R 75. 299. 2 Ch Pl 523. 1 New 296. 2. 2nd 40

But a justification of a military means
is the justification of the battery the battery
sh: be denied - many authorities to the
contrary but these are contrary to principle
& to the modern opinions CroE 93:4 21 contr 193.
1 Kinne 357. 1 2nd 296 (all). Do. Ray? 231.
3 rev 404. 2 Ch Pl 523.

Where the defence charges battery & claiming it
is clear that a mere right of arrest
is not suff: here he must clearly deny
arresting or plead specially that resistance
was made. &c.

Justifications of Battery

or person may justify a battery in his own self defence if then he strikes a purely assaultive man may return the assault or bite, with other blows. Bull of P. 17. 8. Esp 2315.

According to our book in most cases the deft sh^d plead not guilty as to the force & arms but clearly wrong, ~~for of 447~~ - But vide 1 Saund 79 296 (u^d). Cro 266. 1 Hawk 130. 1 Tide 246.

But to make out this justification there must be some reasonable proportion between the ass^t and the defence in strict theory of law the person assaulted may use just so much force 11 Geo 43 as is required for defence, but much more Bull of P. 18 force is in fact allowed and ought to be 12 Geo 42 allowed - The question concerning the 13 Geo 46 reasonableness of the force and in the defence Esp 315. is for the jury -

But if from a slight ass^t by A a scuffle ensues and A is mayhemed B is justified - 12 Geo 43.

(234) Justifications of battery, &c

The words of this plea are son ap^t domestic
Salk 642. Esp & 315. Plea ap 447.

But it seems that mayhem is not justified
by the Df's aggression unless that aggression
might have endangered the death of a
limb. 10 Ray 177. Esp & 315. Helled 43.
Salk 642. This is a rule of strict law but
cannot be enforced in practice.

To this plea there is a good replication,
de injuria sua propria abs tali causa this
denies the Df's first assault & Co 66. 11 B & P 76
and denies the whole plea of son ap^t—

again where Df is the blameable cause of the
battery the he committed no ap^t or battery on
the Df yet in some cases the Df is
justified 10 Ray 177. Salk 642. Cro 366.
Esp & 315.

Parent is justified in reasonably chastising his children. School master his pupils. jailor his prisoners. 1 Hank B.O. 1 Mod. 176.7. Esp. L. 315.
Bull. A.P. 18. Master may also chastise his servant.

And formerly Hus. could chastise his wife but the law now seems to be differ tho. the law has not been judicially overruled.
1 Hank B.O. 1 Bac 155

One may justify a battery in defence of his wife parent or child Husband &c & here the principle & rules are the same as in self defence 20 Ray? 62. Bull. A.P. 18. Esp. L. 314

Serv. may justify a battery in defence of his master & the better opinion is that a master may justify a battery in defence of his servant Bull. 18.9. 20 Ray? 62. 2 Rol 546. Salk 407. 12L 429. vide Master & Serv

(236) Justification of battery &c

But in these cases the battery must be alleged to have been in defence of the wife child &c. the law will not allow an imputed justification. 20 Kay 62 (1794). Esp & 311 the 473. And the proof must accord with the allegation the battery must in proof appear to have been in defence of patient &c.

One may justify a battery in defence of his property when forcibly invaded but where there is nothing more than nominal violence on the part of the deft the deft cannot use violence except a previous request to the wrong doer to depart. Salk 641. 1 Hawk 130. Bull N P 14. Esp & 314

In case of a mere entry on another's land the battery must it is said be justified not as a battery but as a molestation manifestly imposed. Bull N P 14. 20 Kay 62. Salk 407. 1 Collod 36. 2 Ch P 52 (1794). Comm Dig Pl 3. m 15. (1778)
If this rule is correct the land owner may at the request only push or push the wrong doer out.

c 4th & 7th Battery (122) (False impresⁿ No 1).

Justification defence of land

These rules suppose the owner to be in possⁿ of his property at the time of the violence and are founded on the right of defending possession. But where the owner is dispossessed or out of possession the person out of possⁿ may not regain possession by force.

T Rich. 2: He have made this rule at C L he might regain possession of his own land by violence 3 BL 174 4 BL 148.
2 Bac 555.

We have a similar St in Count.

These Sts contemplate cases however in which the owner has in some measure abandoned the possession or vacant possession a holding over by tenet

But a casual or temporary absence from one's property does not prevent the owner from putting the dispossessor out with violence (12)

(238)

Justifications of battery &c

In case of personal property possession cannot be
regained by force except in case of seizure
the owner may defend his possession
by violence 3 Bl 4. 5. 2 R 6 565. 6.

Provocation by bare words never justifies
a battery tho' it may mitigate damages
greatly 1 Mil 6. Esp 3317.

A serf cannot justify a battery in defence
of his master's goods. 1 Cr 142. But the
rule means that he cannot justify much
because they were his master's. But if they
were in the special keeping of the serf
with doubt he may justify a battery in
defence of it. Every bailie may do it —

Declaration If A should beat B to day tomorrow &c this battery
cannot be laid in one count with a
continuand. (nor as having been committed
at diff^t days & times) * because an ass^t is one
entire indivisible act — Corp 125. Esp 9316.
6 East 395. 1 D & Cr 174.

x 2u.

Assault + Battery

Declaration

But the Def in the same decⁿ in diff^t county
as many batteries as he has to complain of

When an action is brought by Ans^r + wife for
a battery committed on her it sh^d be ad
damnum ipsum for the damage, survive
to Ray? Nos. 1 Sid 488j. Esp 531C. 1 Rol 752

If a Def survive an action brought by one battery may
plead survive to the battery in an action there
must be instructions decⁿ 224C Esp 531C 1 Rol 752

The Def may lay in in his decⁿ to prove facts
for which he cannot himself account, that
he beat his servants and he may prove
them that it is so he may do for the
purpose of aggravating damages but in
truth he does it to show the enormity
of the battery on himself Salk 642. Esp 5374 (u)
317. 2 Ch Pl 374 (u).

By the C^x any justification must be Pleadings
specially pleaded. Co Litt 282H. Esp 5317

Under our Act justification may be given in
evidence under the joinder but by rule
of practice notice must be given.

(240)
Readings

Def. & Battery
occurring at the time of the alleged assault
But fact, which is specifically pleaded w^o have
launched the action as a justification may
be given in evidence under the genl issue
to mitigate damages. Exp 517.

Rule aff in slander, guided the truth of
the words spoken but the rule here laid
down appears to be correct.

where the deft pleads a justification he must
in that plea confess the battery or the def
may pray the Ct to disallow the plea,
Salk 537. Exp 5315. 2 ch R 523-545. The
rule as laid down misleads the student
the rule means merely that the justification
should not amount to a denial of the
battery. It does not mean that in
terms the deft sh. say 'I did commit
this battery'. It seems to mean nothing
more than that deft. sh. not plead specifically
as a justification that w^h amounts to the genl
issue -

If the deft pleads one apt. demand the Pif may
justify that apt. & if he does he will be entitled to
verdict but this justification of this first apt.
must be specially replied (Esp & 317). It cannot
be given in evidence under the genl replication
de injuria sua propria &c. — Chitty says that

whether of more excuse it is so may be either pleaded
or given in evidence under the genl plea & that
the battery was by inevitable accident Bull 1,
balk 637. 4 ed 404. Esp & 317. 2d Chitty says that the excuse must be pleaded
specially. but the excuse of inevitable accident
might I think to be given in evidence under the
genl plea — the excuse that the battery happens
in an amicable contest might I think to be
pleaded specially — so that no genl rule
can be said down as to excuses.

Where the deft justifies with a mollitor manus
the Pif may reply non tota demeretur
tota causa — Chitty says that the Pif may

if he may plead specially traversing any one
material fact in the plea

(242)

Readings

4th & 11th Battery

For he may reply the deft committed an outrageous battery & argue hoc that he committed murder without? Com on 407 p. 20
8 Co 57. 11 Bur 320. 4th 321. 5th 321

The Plf in his proof is not confined to the time laid in the declaration and the Plf may prove a battery prior to the four years limitation unless the deft pleads the statute - But with as the deft may plead not guilty & give the stat in evidence by our stat of pleading.

See 11th 321

On the other hand a special plea must cover all the time within which the Plf can prove a battery, thus if Plf alleges a battery on 1st Aug & the deft pleads a justification on that day, he must in genl also plead absque hoc that he has not been guilty on any other day. vide Pleading 406 104
1 Ld Ray 224. 231. 2 Saund 295. 407. 321. 232
314. 415. Bull 117. 118. 119. 120. 121.

But it is s^o that if deft pleads conspit down on a particular day, he need not conclude with a traverse of absque hoc that he is guilty on any other day. For proof that on that particular day is prima facie good evidence for any other day. Bull 17.

Again the Plea must be as broad as the
declaration as to the subject matter of
the declaration or it is bad in toto. Ex
Pct alleges apst battery & mayhem & the deft
pleads a defense good in law as to the apst
& battery but not as to the mayhem this head
is bad for the whole & the Pct will recover
for the apst & battery as well as the mayhem —
C. & C. 2d ed. 318 Plea apst 447

The plea must be as broad as the declaration or it is bad in toto!

In justifying a battery in defense of one's wife
Parent master &c the act must be alleged
to have been done to prevent an apst on the
wife Parent child &c. and must allege
the necessity of the intervention —
120 Ray 62 (nd 2) Rob 546 Stea 455. C. & C. 318

(244)

Readings

of St. V Battery

A recovery of damages for the same battery
either by the deft himself or by another
is a good bar to a subsequent action.
Cro & 30. Cro & 73:4. Vels- 65:1. Lark II. 1811.
Esp & 319. 416. See also Chattendon & Blagden 2d County.

And this rule holds tho' further damage
shd have accrued after the action first
brot. for the battery is the gist of the
action. Lark II. Esp & 319.

So if the Plf had given a release & subseqt
damage shd accrue the rule w^d probably
be the same. Chattendon & Blagden 2d County.

If the injury is done by several the Plf may
sue one or all or part 5 R 651. Esp & 317.
A release to one is a discharge to the whole
4 r 666. Esp & 415. But where several defts
are sued together & a recovery had agt them
all it has been a question how far a jury
may sever in damages. & if they do can
the Plf have judgment for all.

As a general rule, if two or more are sued jointly & found jointly guilty it is said that the jury cannot sever in the damages for each here is guilty of the whole trespass.
5 Burr 2790. Carth 19. 11 Co 5. Jenk 317. Cro J 118.
Esp & 321. 420.

So if judge goes ag^t all by default the rule is the same. the default is an admission that they are jointly guilty of the trespass.
Stra 422. Esp & 420.

But by some of the doct^rs both plead & sever in their pleas the jury may sever in damages if both pleas are found ag^t. the doct^rs 2 Stra 1140. Esp & 420. This opinion appears to S & G incorrect. If the issues are both found ag^t the doct^rs they stand on the record both guilty & the weight of authority is ag^t the rule.
Cro & 560. Hob 66. 11 Co 617. Ball 20.
Cro J 345. a 350. Carth 19. 1 Saunders 207 (a).
5 Burr 2792. Cro J 111. Stra 410. Cro J 354.
1 Sid 660:1.

(246)

Pleading Ass't & Battery

But, it is so that the jury may find one
def't guilty of one part and another of
C. & S. 60 another part & then that they may serve
C. & S. 420 in their damages.

But this rule is denied in its full extent
and justly denied for Coke says

and this case can occur only in one case
where A commences a battery & B afterwards
comes in & continues the battery assisting
A.
11 Co 57. C. & S. 54. Ball 20.

This rule is true for if they can be joined
in one action they must be jointly guilty
of the whole except in the one case stated
above & therefore

If in cases where the jury ought not to
serve damages they do serve the Plt cannot
have justice for both apartments he may
11 Co 71a set aside the verdict & have a venire
Cautley de novo. and if justice sh^d be rendered
Ball 120 for both apartments it w^d be erroneous.

But if the Plt pleases he may rent one
apartment in the second & take judgt of
the other & this is called taking judgt
for *melioribus damnis* & he may take
this judgt agt both or agt him only
agt whom the better apartment is made.
Earth 20. 1 dand 20th al. 67 R 144. 200
Ball N 20.

Or the Plt may enter a nol pro as to
one & take judgt agt the other alone.
Id.

But in all these cases in whh the damage
ought to be ent in the Plt can have
only one Ex^{pl} & 11 Co 7. (al. 5. 51 Bar 2740.
Earth 14. Cr. J 113. Exp 2. 321. 420.

And where there is an improper apartment
& the Plt does not rent or enter a Cr. C 73
nol pro so the deft may move in 176
in quest of judgt or the Plt may move H 170
in quest of judgt if he chooses and Earth 19.
in either case a *renew de novo* will Ball 20
be awarded.

2 Pleadings 9th & 10th

In Eng^d it has been holden that a not proo^r a non
suit before judgment as to one of several defts discharge^d
the action as to all 40671. This is not considered
as law in Eng^d? 1 Saund 207. 3 Balc 511. 1 Wils 40. 306
2 Ray? 597.

In Eng^d & in C the Ct will give the Pl^t leave to
strike out the name of one of several defts from
the declⁿ & then to proceed & call him as a witness
so he may strike out more than one.

When one deft wishes for the evidence of a co deft
it is a rule that if there is no evidence ag^t the
co deft he may be sworn Pl^t may have included
him for the purpose of preventing him from giving
evidence. But if there is ~~any~~ evidence ag^t him
he must be tried before he can testify. But
the Ct may admit a verdict to be first taken
as to him & if he is acquitted he may be sworn.
He is then not interested Bull 285. 2 Bae 287
1 Sidn 441. contra Ph Er 61:2. - 61.(n.4). 2 Root 282

The jury may if they please vary from the declⁿ,
& find only a part as guilty of the battery but
not of the wounding. This is true of actions
of trespass in genl Est 481. 2 Rol 284. Cro C 39. 54
The jury cannot be bound to find deft guilty
of all what is charged ag^t him.

The increasing of damages by the judges *super visum*
voluntis is never practiced in the state & probably is
not here law

- In this as in other actions the jury cannot give more
damages than the Plt demands but the Plt may
up it the except & take judgment for what he demands
but judgment is erroneous if rendered for more than
the demand Cro 197. esp D 420. Carth 21.
10 Co 115 b 14 B 642

Every 4th & 11 Battery is to include a crime as
well as a private wrong 1 Hawk 134. 3 BL 121 4 Co 45

this rule is too broad this is not true of
accidental batteries the accident is an excuse
for the public offence tho' not for the private
wrong unless the accident is inevitable —
Nemo fit. reus nisi mens est rea.

In count. we have a statute respecting secret
batteries the party thus secretly beaten may
bring a quare tam information accompanied
with a criminal capias & the proceeding is
criminal throughout & the person beaten is
a good wrongdoer.

(250)

Trap for false imprisonment.

every violation of one's right of free motion
is false imprisonment & the restraint may
be in a house in the street &c 3 Bl 127
Ex & 326.

The requisites to the wrong are two first that
there be a detention of the person 2^{dly} that
the detention be unlawful & the unlawfulness
of the detention consists in the want of
authority to detain. Authority to detain
the person of another may arise from
from legal process. 2^{dly} from
some special cause with legal process which
warrants the detention. 1 Ash 408. 3 Bl 127
Exp & 326.

There is one species of unlawful detention
for which the action never lies that is when
the crew of a ship are illegally captured
as prize for the wrong is cognizable only
in the admiralty court. Long 574.

But every arrest of the person for a civil cause
with civil process is unlawful & a custom
to the contrary is bad. 5 Bl 119.

(252)

Judges of its of record when liable?

But a private person is not guilty of false imprisonment in assisting an officer in executing civil process 2 Rol 501. 5 Bac 169.

The most frequent cases of false imprisonment are under void process.

A judge of a Court of record of genl jurisdiction is not liable at all for any judicial act such 396 whether done thro' mistake or malice if such 172 he confines himself within his jurisdiction 1 R 503.

For no proof will be permitted in such 534:8. 13:4 case as to the violent presumption of such 2 B & R 441 a judge's jurisdiction. Such a judge can 5 John 222. be punished only by removal from office.

6 Can & P 49. If then this or other action is brought against such a judge criminal or civil it is to decide but that he acted as a judge of record & of genl jurisdiction.

"Reason is that such an exemption must exist somewhere in every regular government for there must be some rank than which none can be higher

§ 5 The policy of the law requires such an exemption. — No one will accept the office of judge if liable to be harassed by suits by every one who might think himself aggrieved by his decisions

But if a ct of record even of civil jurisdiction
has not jurisdiction of the subject matter
of the process, tho it is liable, it does not
act judicially - the whole proceeding is
coram non iudice & void. In such this partic-
ular case tho are not judges they are
mere individuals.

Of record of
Ct of limited jurisdiction are liable if
they transgress their authority even by
mistake. ex: If the record is entered
in a civil cause of wht the Ct has juris-
diction the Ct are liable in false imprison-
ment tho they are not transgress their jurisdiction
but they are taken authority. Ex again
they imprison a man who is liable only
to a fine - But in those cases a Ct
of record of civil jurisdiction is not
be liable. 1 D. R. 42. 2 Bl R 1145. 1 Ch. R.
396. 2 Stra 99. 100. 131. 1 Co 114.

Has the same necessity for exemption
does not exist. It is necessary only in the
highest order of Ct.

(254)

Judges of Ct of record who liable?

Be it understood that jurisdiction I understand
its deciding & acting & deciding in a
case when it has no right or legal authority
to act or decide at all

But exceeding its authority, means the
Ct exercising some power whh it has
no right to exercise in a case however
over whh it has a right to act & decide

But Ct of record of limited jurisd.
are not liable even for their malicious
acts if they do not exceed their authority
Ex if having cognizance of the cause they
inflict an unreasonably high punishment.
or if they sh^d decide ag^t evidence. Or
sh^d willfully decide ag^t law for in these
cases there is no excess of jurisdiction or
authority talk 296. Esp & 326.

But Ct not of record as justices of the
peace in Engl^d are at all liable not only
for malicious wrongs but for mistakes in
judgt even tho' acting within their jurisdiction
Stra 710. Croc 286. & 394. 1 BLC 354. 15R 556.
1 Bun 595. Esp & 328. But this rule is now
greatly mitigated by English Sts. and besides
17R 653 the Ct of BR in its description will not grant
a complaint ag^t a justice.

In Count justices of the peace are cts of record
so our county cts of course the Sup: & Supreme
Ct. the courts of probate are not cts of
record.

Any ct from where judge a writ of error
will lie is a ct of record tho' this is not
true & converse Ex Supreme Ct.

It is so that any ct whh has authority to Lo Ray 407
fine & imprison is a ct of record but this talk 200
was denied to be true in a H.R. by Lo Carth 491.
Ch justice De Grey. 2 Bl R 1146 3 Bl 24:5.
will send a paper to the printer of record. Kellogg 386.
do it before hand to not within the record.
this rule

Atty gen. White's opinion. Remains to be

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§ 11. 388 A man cannot be arrested for a debt to
2 RLR 142 of the testator or intestate unless there is a
3 M. 348 suggestion of duress or if he is there
377 arrested the Plf & the atty if instrumental in
causing the arrest are liable in false imprisonment
& the atty in general is liable when instrumental
in procuring an illegal arrest.

Witness on any Ct of justice is exempted in going
to the Ct in the Ct & in going from the Ct
2 RLR 73 1 HBL 630.

Same of sedition in the Ct
and this exemption of witness & master extends
to his horse baggage & the money which he carries.
2 RLR 273. 4 Mac 222

In these cases however by the English practice
the arrest is not in the first case illegal for
the Officer cannot be supposed to know & is not
1. R 534 obliged to take the fifth word - But the Ct
45 R 377 immediately gives a supersedeas to the inf
2 RLR 103 and if ~~after~~ after this detaining the prisoner
1142 he is liable in this action

Crosby 374

Long 649. 652

In Court the usual practice is for a soldier
or watchman apprehensive of arrest to
obtain a writ of protection from the Ct &
on production of this writ Plf must release
or he is guilty of false imprisonment.
But where this is not done the case is the
same as in Engl. -

False imprisonment. (cont.)

But in these cases the illegality of the arrest does not defeat the writ in which the arrest is made.
1. 126 220. 2 136 R 1193

But this privilege is disallowed in case of collusion. Ex. When a debtor is summoned as a witness merely for the sake of getting fresh air — So if one attends as a spectator where there is no suit
2 R R 1193 11 Mod 74. Comp 9 1 4 B 630.

Discharge from arrest in this case is so to be discretionary 1. H B 630. But this rule appears to be confined to at least of extremely narrow extent.

And in all cases where one attends under rule 1744 notice merely.

This principle is not, the principle of the witness or spectator but of the Ct that justice may not be impeded.

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3 East 89 Same exemption extended to witnesses in
Peck Ex 143 an arbitration under rule of Ct.

Members of Legislature - of Congress, &
Electors in going to & from their polls are
exempted -

But in none of these cases is the
action of false imprisonment ~~and~~ maintain-
able unless the deft has violence & his
title to exemption with him the only
remedy in such case is by Habeas corpus.

In Eng^l: certificated bankrupts & peers are
not liable, but in civil cases the Officer
is never liable if he arrests them. He is
bound to obey the writ. But the Jst is
liable in an action on the case for making
an illegal use of legal process. But he is
not liable in false imprisonment
25 R 231. 2 P 570. Doug 646. 5 D. 1007 (14)

When a person makes an unlawful use of
legal process case must be tried for the
act done by the act & case. But doing
of the process is illegal

If a jailer detains his prisoner for long
afterly satisfied he is not liable - he
has a lien - but if after five p.m. the
jailer detains for the expense of board
he is liable 5 Pac 172. 2 West 53.
1 Root 155. 1 West 237. 1 Pac 173.
1 Elrod 132.

Where the order of Court is to confine a person
in a certain prison confinement in any other
place is false imprisonment - he catch 16.
can indeed be confined before Court. Talk 401
mitment as one night be. & if the Court
order is given he must be confined in the solid 295
common jail.

of peace of man must warrant
on reasonable suspicion Drug 334. 345. (359 mg Ed)
1 Root 43.

But a private individual who arrests
with warrant is justified if the person
arrested is guilty, being if not guilty.

But this rule is not necessarily correct if
a felony has been actually committed
on reasonable suspicion a private person
with warrant may bring the person
suspected before a magistrate Long 345.
Esp 2 345. 1 Root 66. & Pac 171.

to also a private individual may arrest
with warrant to prevent a breach of
peace or to prevent an escape & Pals' the
24th 2.

Arrest on Sunday at a good party by St
5 Callod 95. 1 Talk 75. 1 R 265. 2 B L R 1195.
Esp D 127. 605. 2 Bull 72.

But these stat^s extend in construction only
to original arrests & to civil cases.

Special bail may retake on Sunday for
Sunday commit. for taking by bail is
in law merely recaption Talk 626.
3 Talk 145. Esp D 605.

This is not allowed in favour of bail to
the High 2 R L R 1273.

Special bail may on a bail piece retake
principal in another state. or with
bail piece tho' the bail piece is convenient
the bail piece is merely evidence. This
question is now settled formerly much
doubted 7 John 145. 5 Esp R 172 (14).

Root 107 It had been before decided that an off under
an escape warrant might retake the def
in another state. In they can the Gov. of
Rhode Island backed the warrant but
the act of the Gov. was merely void &
the warrant had no effect. But the off
had a right to hold & to retake wherever
found him in St Bilean. —

Arrest by breaking door down to of the
mansion house of debt in civil cause is void
& the arrest of course false imprisonment
5 Co. 1. Comb. 405 62. 2 All. Hall 479.
2 Bac 367. - vide 'Shiff - Gailor'

If an officer having a process of arrest aff
& mistakes & arrests B he is liable in false
imprisonment 2 Co. 552. Long 42. Hard 323.
2 Ro. 1. Esp 320.

But it is s^d that if B had deceived the off
in declaring himself to be A & is arrested
still the action lies -

Esp 320

But B is the faulty & criminal cause
of the trespass & therefore on no principle
can he maintain the action

By our law if a sh^{ff} arrests debt^r body on
mesne or final process when the debt^r
offers goods in satisfaction saffs to enter
by the demand the sh^{ff} is guilty of false
imprisonment - (civil process). This is a statute
rule. 1 Ro. 120.

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A female conv. cannot in good be held in custody under an arrest on mesne process she is usually kept under arrest for the purpose of entering common bail. 2 Stra 772 15 R 486. 1 B L R 720. 1143.

Arresting & confining one for a reasonable time on charge of a crime under a paid order from a magistrate for the purpose of examination is a legal arrest 5 Bae 172 1 Rort 166. 40 R 408. 40 E 29.

And any individual may with a warrant confine for a reasonable time a person deranged in mind & who seems disposed to (5 Bae 172) do mischief—

How far off is liable in executing writs process?

If an off under the authority of a Ct of limited jurisdiction makes an arrest on a process from the face of which it appears ^{that} it have not complete jurisdiction he is liable from whatever cause the want of jurisdiction arises whether from personal privilege &c.
Hard 410. Bull 1212:3. Exp 326.

A defect of jurisdiction is first of subject matter of the suit. 2^d it may arise from a privilege of the def^t exempting him from being sued in that particular Ct & 3^d It may arise from the fact that the cause of action accrued out of the local limits of the jurisdiction of the Ct. —

One case in which it is held that if the Ct have jurisdiction of the subject matter this is suff^t to justify the off. Id Ray 182

In the Massena case it was held that where there is a want of jurisdiction & an arrest on a process the off is liable tho the defect does not appear on the face of the process, tho the off refers to authority from a Ct of limited jurisdiction. 10 Co 67
Cro 314
Exp 337
2 Wils 385
Exp 558:9

This rule when indeed is merely a dictum is denied in these cases by Id Fort &c. Id Ray 230
Stra 509
I do not deem the rule to be law tho it is a hard rule & perhaps is not law.

(264) trusts to under void process.

These rules apply to its limited jurisdiction.
Comp 20 By other provisions of such its, is of limited
2000 196 jurisdiction have cognizance of the subject matter
Exp & 391 the off is justified unless the defect of
Hark 400 jurisdiction appears on the face of the process.
Carr 274
Carr 710

But an off can justify under the process of
a court of general jurisdiction, unless the defect
of jurisdiction goes to the subject matter
Exp 710 even tho the process is void independently
Geo 541 of the jurisdiction for reason of the high
3 Wils 345 authority of these courts, even tho void
on the face of the process.

In court an off is justified in all cases
by his process unless it is void on the face
of it. Will 110. 112.

In the process without a limited jurisdiction
will whether the district can, taken justify
the Off. But yet the Def is liable in cases
where the Off. is excused by his process.
in J 314. Exp & 330. Ball & P 83. 1 Vent 264.
2 East 260.

But according to the single can in 2d Reg? 2d Reg 230.
the Off. Keib 111.

In some cases process is void & the Def & Off
It may be liable for an arrest under
it when the Ct has complete jurisdiction

In its of limited jurisdiction where the
authority is given by St. if the authority is
not strictly pursued the proceedings are
void & the Def & the Ct in jail are liable
for an arrest under it. If it commences 1 Hen 710
under the game laws when the Def has 12th 408
in party the Ct & Def are liable tho' the 5 Co 114
Off is justified 1 Wils 133. Exp & 332. &
you again committing by committal
of bankrupt Exp Reg 331. 42 126 R 1035. 1141.

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Mistaken under void process.

Again any process of any Ct may be void ineluctably of any question of jurisdiction & here the ^{void} Ct is liable for what is done because it 3 Wils 341, 345. 2 Bl R 845. Salk 700. but the Off is not liable if the process is from a ^{superior} Ct, even tho it appears from the face of the process that it is void. But if from an inferior Ct the Off is liable if it appears on the face of it to be void 3 Wils 345.

If the process is from an inferior Ct the rule is if the Ct have jurisdiction but the process is void & the officer executes it after it has been set aside the Off is liable & they hold tho the process is from a ^{superior} Ct of a void jurisdiction - if from an inferior Ct under the same. Bay? 73. 2 Bl R 845. 3 East 128. 3 Wils 345. 1 Stra 159. 15 East 612. 5. 8 pp 291

This an original mist is doubtful yet the Off. may be liable for any abuse of it - as counsel told of the magistrate 17 W 36 222.

An arrest under a process founded on
an irregular proceeding is void. Ex a
part has been set aside for irregularity. 12 East 529
the Off after a trial takes out Ex 1 & 391
an arrest is made under that Ex 1. 13 East 128
the Off is not liable, but with regard to the
to the Off if the process was from a Supr. 12 East 76
Ct & gent would be excused but if
from an inf. Ct he is not excused.

In an Off, executed, the process of a Supr. or
inf. Ct before it is set aside - it is not
set aside the Off is not liable.

After the process of a Supr. Ct is set aside
the Off is liable tho' the Off executed it
before it was set aside (12 East 615.
12 East 95.

But where a process is made erroneous the
execution of it is justified in the Off of
officer even tho' the process is afterwards
be set aside - for an erroneous process is valid
till reversed it is voidable only. 3 Wils 345.
12 East 391. Stra 507. 710.

Recapitulation.

I. It is agreed that when the subject matter of the process is without the jurisdiction of the Ct issuing it, of whatever kind the Ct may be the Ct the Plt & the Off are liable. & English Ct if C.P. must answer to an indictment. (— this rule holds, the defect does not appear on the face of the process, even against the Off, in Eng^l, but not in Conn.)

II. When the want of jurisdiction goes only to the person or place, the Off is justified unless the defect appears on the face of the process & this holds of all courts.

III. When the defect of jurisdiction is not as to subject matter but as to place or person & the process is from a superior Ct, even tho' the defect appears on the face of it is not liable. but if from an inferior Ct it is liable in this case —

IV. When the jurisdiction is complete
the process is irregular & from an inf.
Ct. Off is not liable unless the irregularity
is apparent.

V. Process manifestly erroneous justifies all
acts done under it & if at it is reversed
even the afterwards reversed

These rules apply generally to regular process
It is said that when the writ is in
general process from an inf. Ct. the C/P
must justify by stating that the cause of
action was in pleading alleged to have
arisen within the jurisdiction of the Ct.

Comp 20
Dall 13

(270)

Irregularity of process these imprisonment

Irregularity is not defined in any of the English Books. An irregular process is that which a Ct will set aside in a summary way or motion it does not require a writ of error or an appeal.

Process is held irregular & void when filled up with the proper authority 2 Wils 47. Esp S 329. Thus the person executing the process must be liable tho he did not know the defect.

again process informally issued is irregular & void & issued by a private individual Stra 993. Esp S 329. 2 Wils 385. 385.

A writ made returnable to a term after the first term to which by law it can be returned.

again when a writ is made returnable at an uncertain time, when the day, week or the next Ct of the massey it was held void but afterwards in a similar case the words at the next Ct were held good. Cro 314 Esp S 330 1 Mod 81 Comp 21:2 2 Wils 38

for the terms of a Ct are supposed to be known.

these two last only do not at all
apply to final p. c. b. but they do
do apply to it in Can. —

In an original arrest to capture any subject
oppression in confining the person arrested is
false imprisonment — or confining one in an
illegal manner is illegal imprisonment. Esp D 332
15 R 536.

A arrests under general search warrants are
illegal & void. ex to arrest the author of a
certain libel. — a particular warrant to search
for stolen goods, 2 Wils 275. 1 Hale PC 150.
Esp D 399.

There are four requisites to the validity of a
search warrant. 1st It must be granted on
oath. 2nd the complainant's grounds of
suspicion must be alleged. 3rd The warrant
must be executed in the day time. &
by a Known Officer, in the presence of the
(informer) — 4th The warrant must be
directed to some particular place as
the house of J. D. and even when all
these requisites are observed the informer is
justified only by the warrant 2 Wils 291: 2
Esp D 394.

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The off when all these requisites are observed
is justified without doubt by the warrant.

When an off justifies as such the only proof
required of his official character is that
he acted as such off without showing his
appointment - 13th 1005. 37 R 632 47 R 366.
2 All. Val 485.

When an off serving process justifies under
it he is bound merely to show the process
itself & also that it is returned if the
day of return has arrived & if return
is required Est 333:7. 6 Co 52 2d 1184

But this holds only of mesne process for
mesne process without return is no evidence
5 Co 90(a). 4 Co 67(a). Coupl 20. 1 Wils 17.

But this rule does not hold as against a
deputy sheriff by C. for at C. deputy cannot
return process. - occurs in Court.

Plf under arrest on final process must
show a justification as well as Ex^{te} - see q. 100
the Shff Book 400. q. Ex & 333. 4.

the off^s assistants justify precisely as the
Shff & indeed the rule is: I do think go
further & that the individual is always
to be justified by the command of the Shff.
see custodian's

But when an individual procures the
service of process for another he must
justify precisely as the Plf. he must
show justification as well as Ex^{te} - he takes the
place of the Plf - Book 400. q.

(274/

If the original Plt & the Off are made
together & (make the same plea) the Plea
is insuffe in law for one it is insuffe
for both & is join in one & the same plea)

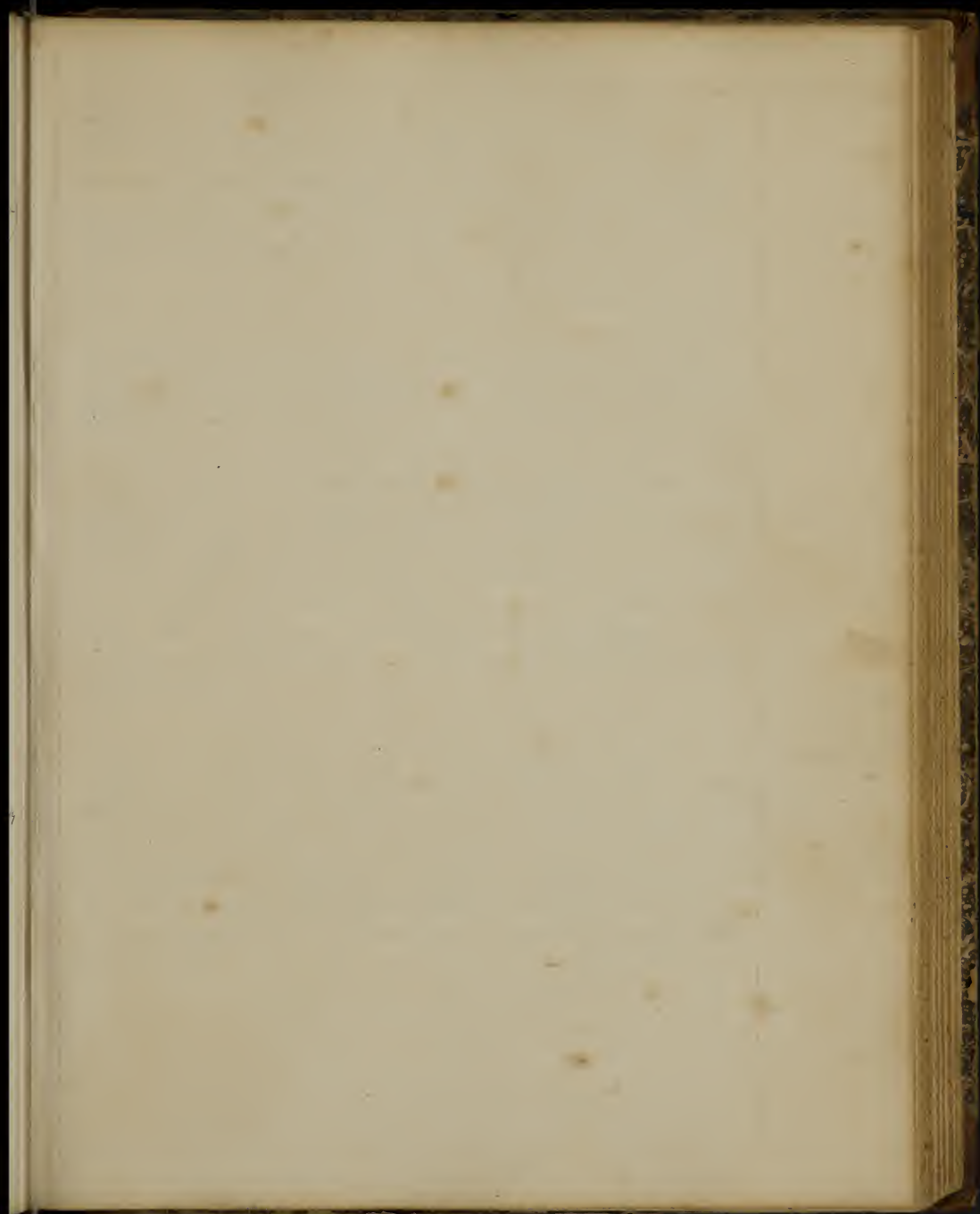
Where the liabilities of the Off & Plt are
differe they sh: serve in their pleas tho'
they may plead the same plea & still
not join in the plea -

esp & 336. Stra 443. 1134. 509. 1 Wils 17.

Procuring commanding aiding assisting in
an illegal imprisonment is a trespass.
Co Litt 374b. 1 Hack 409. 2 Hawk 572. 6 Wils 377

If a servant for Ex. assist. command &
master cannot justify -

And procuring a sovereign prison thro'
fear unlawfully to imprison another is procuring
false imprisonment. 2 BL R 483. 1055



(270)

Malicious prosecution

This is an action on the case it lies to recover damages ag^t any one who has prosecuted another maliciously & with probable cause -

By probable cause is meant reasonable ground of suspicion - Feltz 116. Esp & 525.
527: F. 1 Bar 61. -

By malice is meant any unlawful motive
This action is analogous to the action of conspiracy which is now nearly out of use
But the action of conspiracy lies only ag^t two or more for prosecuting one for the offence of treason or felony.
1 Saund 230 (a). 3 Bl 205. See Ray 379.
Esp & 530.

This action also resembles the action on the case in nature of a conspiracy which is where two or more conspire to injure another in his person fame or property. or to prosecute another without cause & maliciously - Feltz 14. 1 Saund 230 (a).
Esp & 530.

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The parameters of the action for malicious prosecution also resembles the action of slander. for the reputation expense & scandal are suff. grounds of damage to maintain this action —
2 Bl 127
100 Mod 219
Str 591
Balk 13:14

The action of conspiracy lies not unless the pl^t has been actually prosecuted & actually acquitted for such is the form of the writ.

an indictment for conspiracy lies with any actual prosecution Cro J. 120 23.
Exp 509. 8. 1 Wils 211. Exp 530 Fily 114 =
gc 564 2 rev 57. Exp 530.

So an action on the case in nature of a conspiracy lies tho' no indictment has been actually made 1 Roll 112. 1 Bac 1.

In an action of conspiracy if all the defts except one are acquitted, judge cannot go ag^t him. But in an action on the case in nature &c. one only may be subjected. The declaration indeed must charge two defts a charge one simul can not be, conspired to —
Co Ray: 379. Balk 13:14. Wils 210.
Exp 530. Colled 169.

In the action of conspiracy the gist of
the action is the personal danger. But
not so in the action on the case in
nature &c. Earth 416. 9 Bl 126. 127.
Pulley 14. Stra 691.

An action on the case in nature &c is
substantially the same as that malicious
prosecution but the latter may be
brought up one with the 'simul cum' &c
2 Lev 52. 1 Wils 210. 1 Saund 230a. Exp D 531.
Pulley 14. 5 Mod 408.

Malicious prosⁿ may be brought up two (H)

the action of conspiracy. & on the case in
nature of &c. & for malicious prosⁿ are
unknown at C. L. the action cannot
originate in C. L. & was framed by
his direction transacted by his par
liament 2 Reue 4 C. L. 239. 328 3 Do 58 Pulley 24.
Earth 416.
127. But the two last actions are
derived from Writon 2 C.
2 rev 20. —

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In the action for malicious prosecution
malice & want of probable cause must
concur. Bull N^o 14. 4 Barn 1971. 15 R 544. 5
Exp & seq. - in C 900. Exp & 593. Bull N^o 14.

In practice the real gravamen of this
action is the same as that of slander
viz the injury to the reputation. But
in slander nothing but the absolute
truth of the words will justify but here
probable reason that the charge was
true is suff^t.

This action lies for a crime prosecution & sometimes
for a prior civil suit.

Salk 14 It will lie when one has been falsely & maliciously
Debo 40 indicted for a crime whh w^d injure his
Sid 15 reputation. or 2^d for an offence whh
would endanger his life & liberty. & then for
Ed Ray 378 an offence whh ^{or a subject} subjected the person indicted
Stra 977 to more expense with endangering life or
Exp & 528 liberty or reputation. & it w^d therefore now
Salk 15 seem that this action lies in all cases
Hill 379 in whh one has been falsely & maliciously
indicted. -

45 R 248. And it is not necessary that the Pt sh^d have
312 L 127. been endangered at all. for if the indictment
Exp & 528 is radically defective this action lies.
Salk 15.

scandal vexation or expense are then respectively
suff^t to maintain the action so far as
regards damage.

And the action lies for a mere presentment
to a grand jury, tho' the grand jury find
the complaint untrue. Cro & 490. Salk 14.
Esp D 528.

And mere expense incurred by an indictment
will support the action tho' there
is no danger of life liberty or reputation
& 12 L 127. Salk 15. 10 Clod 148. 244. 2 Stra 977.
Esp D 528. Clod 25. 73. 137. (Salk 14:15 contra)

But a public officer commencing officially
on false information a prosecution is not
liable. but the individual giving the
information maliciously & with probable
cause is liable. Leon: 187. Cro E 130.
2 T R 231.

But if a public off with any information
& of his own mere motion maliciously
& with probable cause prosecutes another
he is liable to this action 2 T R 231. 225.
Cro E 130. Com 161. -

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And if the magistrate is the off in this case & he grants the warrant trespass for false imprisonment is the proper action. For here the magistrate is the immediate & not the remote cause of the arrest for the shp is merely an instrument - But where the off is the remote cause of an arrest false imprisonment will never lie 25 R 231. Exp & 530. (contra Cr. & 231)

This action never lies till the malicious prosecution is in some way at an end for if it could a strange incongruity would occur 9 Co 56. Hob 207. Doug 205. Tra 114. 25 R 231.

In this action this fact must be alleged in the declaration otherwise there is no complete cause of action -

In the action of conspiracy the pl must allege that the parties are legitimate modo acquiescentes. 9 Co 56. Hob 207. Tra 114. 25 R 231. Hob 207. Tra 114.

The omission of this allegation is rectified by verdict for the pl must intend (1 Saund 228. Exp & 532) that the jury had evidence of the termination of the plot - Hob 267. Doug 205. 25 R 225. Swifts Digest 2v 778 -

and the 2d name - show in the 1st the
manner in which an act was put to the
test - that too in the 1st. 1840.
1840. 1840. 1840.

The act must also state all the proceedings
in the original prosecution and any
prosecution in a material point or
fact as a variance - by that state
a matter of 1st. 1st. 1st. 1st. 1st. 1st.
1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st.
1840. 1840. 1840. 1840. 1840. 1840.

But this action will be - be a judge
of record is not a petty, a grand jury
in an act done in the presence
discharge of their official proceedings
1. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st. 1st.
1840. 1840. 1840. 1840. 1840. 1840. 1840. 1840. 1840. 1840.

Malice may be found in the mind from
the want of probable cause. but want
of probable cause can. or be inferred from
any degree of malice 1840. 1840. 1840.
1840. 1840. 1840.

in 2d is however always at liberty to
 prove express malice & for this purpose he
 may give in evidence any collateral facts
 tending to prove malice. *Ex D*
 135.

But conviction of the present rep, in the
 original prosⁿ before a Ct of competent
 jurisdiction is conclusive evidence of
 probable cause. 1 Wils 232. 4 & 6 267.
Ex D 529. 6 *Ex D* 262.

The acquittal of the party prosecuted
 is presumptive but by no means
conclusive evidence of want of probable
 cause. It merely throws the onus
 probandi on the Dept to show
 probable cause. 1 Wils 232. *Ex D* 520

4-1224 That an acquittal even in a defect
 34k15 in the indictment is no proof of in-
 guilt presumptive evidence of the want
 of probable cause —

But in negatives is in these cases not an
presumptive evidence of want of probable
cause. If the def in the present action
was bound over by the ct of inquiry.

¶ If in the trial part the grand jury
found a true bill not bound def the
chefts the new prosecution. — But there
is one exception to this exception viz where
the facts on which the inquiry indictment
was made, must necessarily lie in the usual
case of the present def other exception holds
in the 4th exception. Rule 14. Ex § 530.1.

¶ If it appears from the judge's report
of the cause that there was probable cause
there is prima facie evidence. Rule 15.
Rule 14. Ex § 530.

Warrant to arrest § 45 Taylor & Williams.

The evidence which the complainant gave before
the grand jury is in this nature and being. Rule 14
good evidence of probable cause in his Ex § 535
own favour. As his evidence on the trial Rule 210
of the indictment — The def being
cannot give evidence but other witnesses
may prove what the def said — This rule
is founded on the necessity of protecting prosecutors.
But this rule does not obtain if there
was other witnesses on the fact charged
in the former presentation —

What amounts to probable cause is a question of law but the existence of probable cause in a given case is in the first instance a mixed question but when the facts & circumstances are ascertained the question then becomes a question of law. 17 R 545. 59. Boe & P 14. Esp & 529.

+ The defence to this action is always probable cause - turns upon this fact & probable cause must always be specially pleaded - he must set forth the precise facts on which his suspicion was founded - He pleads - may traverse & deny these facts & he may demand - Cr & 24. Es & 533.

+ contra 1 Ch R 488. also Smiths Digest 1st vol 647 Es.

It appears to be sufficient to the defence of probable cause that the officer prosecuted for sh. have been committed. (Hopkins & Clinton Court) Belrod 216. 2 Hank 120. Esp & 534.

what aunts to make is a question of law what
facts exist to create it is a question for the jury.
Lo Ray: 1493 12 R 519 1 Mil: 233

When there is a former process for felony the
Plt must produce a copy of the record of 113CR353
the indictment ^{from the} ~~from the~~ Ct where the procs. 50534
was merely for a misdemeanor a copy 113ac 51.
this not granted by the Ct is sufft. In
the former case it is in the discretion of
the Ct to grant the indictment to grant
or not to grant the copy Carth 421.
113L 126. 50534. see vide Stark ex 907. part 4th

Under our law where the prosec^r complained
it was a crim^e prosec^r the action is called
malicious prosec^r & where it was a civil
suit it is called an action for a violation
law suit —

the action will not lie for a vexatious suit 13-14
civil suit however grounded the claim Ball II
may be if this is all in the case 1340205

1349205.

10 John 106

Exp \$ 525.

2 Ph Ev 116 (n)

(255)

But this rule means merely that in such case the law presumes no damage & the rule admits of four exceptions.

Jack 24 I When there is a good ground of action
B. & R. in favor of one person & I & a stranger
exp 226 with authority being - and in this
ground of action the action lies

II When the Def having a good cause of
action sues in a Ct. not having
2 M. 302 cognizance of it the action lies but
Exp 226 It thinks that the Def must have known
that the Ct. had no jurisdiction & a little
this knowledge makes cannot be presumed.

III If one having no cause of action of
action & knowing this sues another for
some violation & in case the Def. to bail
the action lies 2 M. 305 1 M. 311.

2 L. 24. 3 Cent 314. But it seems that
the action will not lie with the Def.
was obliged to pay Bond 2 M. 305
2 M. 307. for imprisonment for which
he was held to bail the party is held
to be a sufficient compensation - from
the old books it is seen that such an
action is not in any case lie.

IV If one for the purpose of vexation sues
one & holds him to bail for a much
greater sum than is actually due the
action lies - here holding to ex parte bail
is the gist of the action. 1 Salk 12. Exp D
225. 1 Salk 225. 1 Salk 424.

Again this action will lie for making
a wrongful & oppressive use of process.
It will lie for a wrongful taking of goods
as well as for the taking of the body.
4 Hob 200. 205. Bull 12. Exp D 227.

There is no cause to be assigned to be
a sufficient satisfaction for the injury.

When the action is for a privilege and
the particular injury must in general
be stated in the declaration that the
proceeding was vexatious, or sufficient
to hold him to ex parte bail - Here the
law does not presume damage. 2 Wils 305
1 Salk 14. 1 Salk 424. 2 Salk 310. Bull 12
And the Pl must prove the special
damage in privilege that he was held to
ex parte bail. - 2 Salk 374. 1 Salk 14. 5

(290)

If it incurs B to bring a grounds suit
ag^t C. it is liable to C in this action
and here special damage need not
be alleged as Lay? No. Back 14.

To maintain this action for a plain
civil suit there are two special
requirements

I The plain action must in some way
be determined.

II There must be damage already
incurred or inevitable. If one forges
a bond in my name with intent,
merely to sue I cannot sue him for
forging the bond until he sues me &
that suit is determined.

And again if one takes out a second
fi fa wrongfully I cannot sue until
the second fi fa is put in Ex^t —

But it is not necessary that the plain suit
sh^d have been determined in favor of
the present pit. It is suff^t that an end
is put to the suit and not in favor
of the present def^t. Back 11. Ex^t 127.

Ex^t 295
Itra 114.
Back 15.
Back 13.

Ex^t 527
531

Our Ct gives this action to any one who
shall be vexatiously sued & give
trouble damages. & subjects to a fine
of seven dollars or verdict against him
on this suit. this fine is imposed on
motion of the Plf - see revision of 1821 tit 107. Vex Suits.

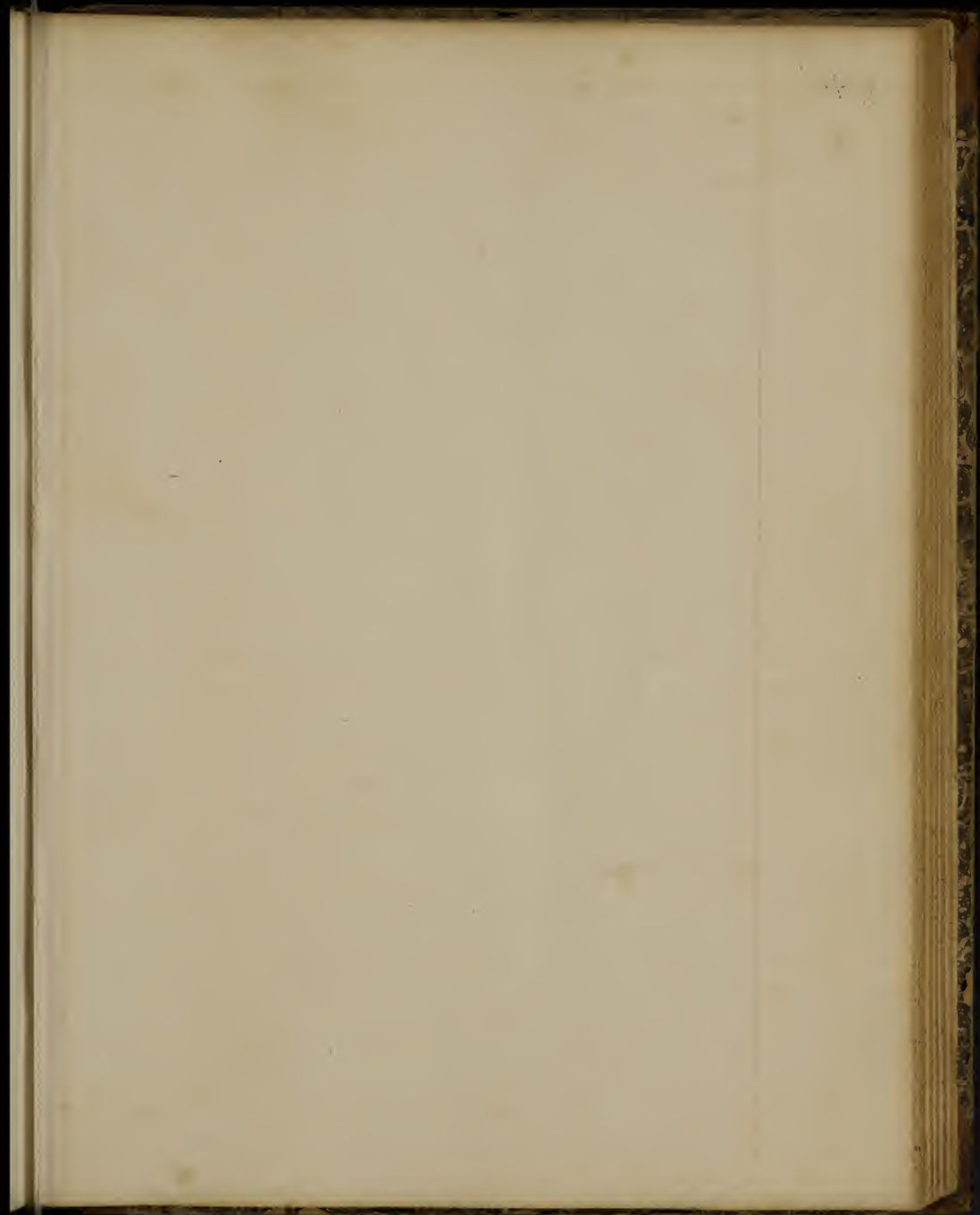
Two persons cannot join in this action
for the injury is separate & personal. sec 145
even tho the present pifs were sued as
co defts -

But in case of two jt merchants who have
been sued together to the injury of
their jt trade perhaps there is an excep-
tion in analogy to slander.

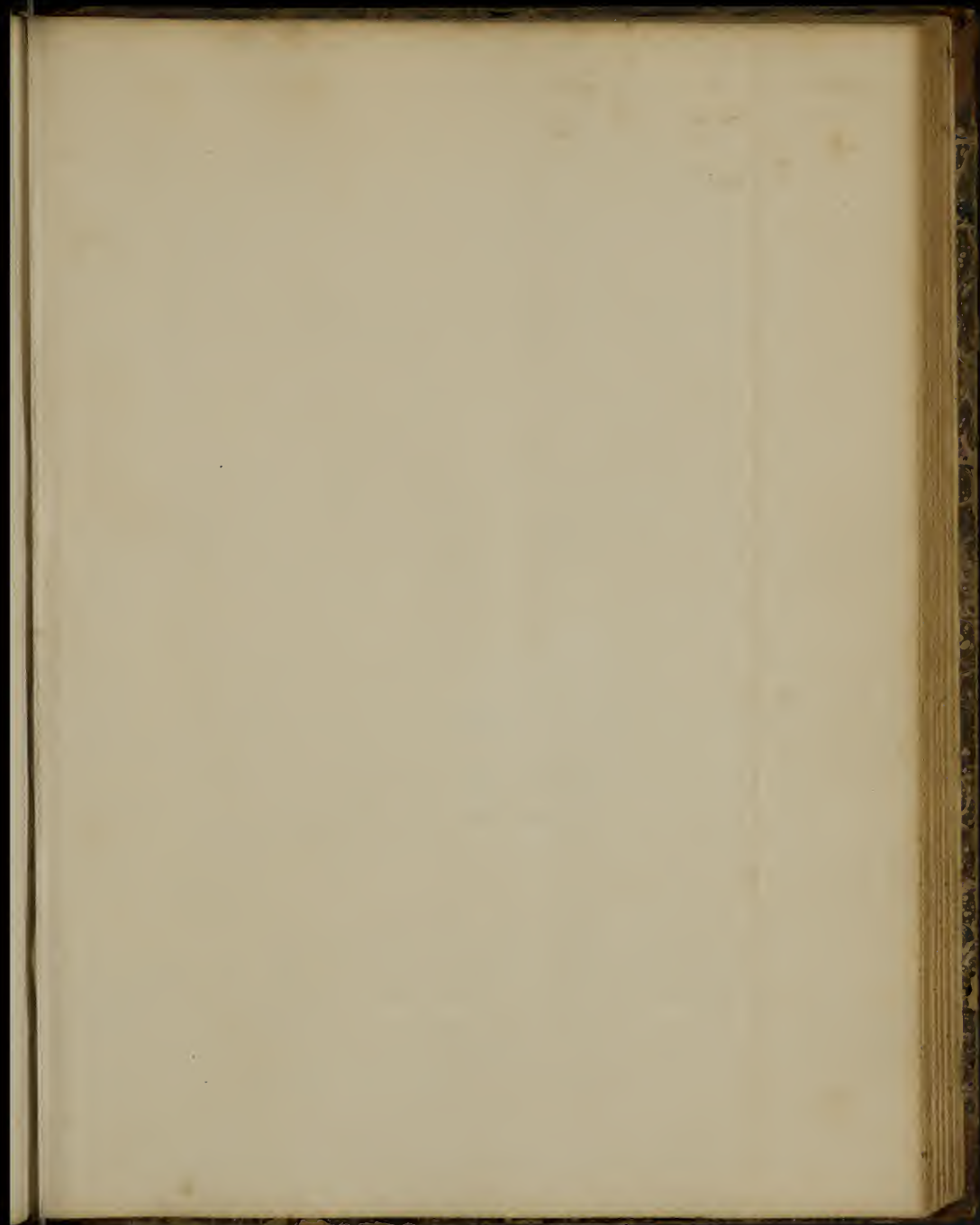
Two persons may be joined as defts for
this is a tort in which any number may
join 1 Stra 79. 2 Do 910. Esp D 537.

May damages in such case be recovered?
there are two cases directly contrary,
Stra 79. 2 Stra 910. Esp D 537. I think
damages cannot be recovered. it is an
indivisible wrong & as the diffracts done
by each conduce to the same result -

(292)



(294/



(296)

Trespass for injuries to things personal

Trespass is divided into three kinds

- I Trespass to the person as 2^d & Battery & False Imprisonment
- II Trespass to real propy as trespass on land
- III Trespass to personal property which is now to be considered.

The term trespass in its most extensive significance includes every transgression of the law 3 Bl 208.
Bac 157.

But in its true legal sense it denotes any civil wrong committed with force to the person of another person or property & this is its more common acceptation. Esp 980.

The rights to personal property in prop. are liable to two species of injury

I The damage of the chattel while it continues in possession of the owner

II The destruction or deprivation of that possession.

Personal property may be injured in a great variety of ways without altering the possession as killing another's animal, poisoning them & infecting a personal hunt or in general in any way which takes away from the value of the chattel. 3 Bl 153

(295)

the remedy applied by law for any such abuse, while the owner's proper remedy is the action of trespass if it can be proved the act be committed with force & immediately injuring. 3 Bb 153. 2 Rb 576. 5 q.

The action then lies only for such immediate injuries as are committed with force & when the injury complained of is the immediate consequence of the forcible act. For a remote & consequential damage accompanied by any tortious act trespass on the case is the only proper remedy.

If trespass is hot where case is the proper remedy & vice versa the fault is incurable even after verdict. 3 R 125. 2 R 121. Cro C 141. 106.

The judge in these two forms of action very formally differ the one a capiatum has fine the other in misericordia - This is the foundation of the last rule.

This action is not hot to recover a specific restitution of the goods taken but recover damages.

There is one case in which trespass will not lie
for an unlawful taking, nor any action
at C. L. is the unlawful taking of a
ship or goods as prize. The remedy in such
case is always in the admiralty L. R. 572
592.

There are some cases in which trespass will lie
where the original taking was lawful for
a subseq^t abuse of the property. The rule is
where an authority is given by law to take
possession of another's goods & subsequent
abuse of them makes the party taking a
trespasser ab initio so that he may be
subtitled on a declaration charging that
he unlawfully with force & arms took &
carried away the goods. 2 All. 81. Cro. Jac. 45
1 Co. 146. (H. 8) Mod. 20. 1 W. 12. Esp. 383. 405.
2 Den. 126. 1 Col. 20.

If a trespasser enters an inn & afterwards
commits a trespass &c. is still having
taken goods or to destroy or uses them
2 All. 221. 1 Co. 146.

(300)

But to make one a trespasser by
retention, the subject at issue must
be a positive tort or nuisance
& not a nonfeasance. in itself a
tort. 2 Roll 556. 1 Roll 2 136. Esp

There is one case which has been supposed
to be an exception to the last rule
It is where a ship having taken goods
on lawful process does not return the
writ, when the law requires it and
is thereby subjected as a trespasser
2 Roll 563 2 Ray 632 Talk 407

But the true principle of the rule
is that the writ not being returned,
cannot be offered in evidence the ship
therefore can raise no justification.

When the owner of the goods gives the licence
under which another obtains possession the latter cannot in general be made a trespasser
by relation. the law annexes a condition to its own licence but not so to the licence
of the owner. Dec 191
Sec 146 (4)
Sect 467

A bailee therefore cannot in general be made
a trespasser by relation (b). 5 Bae 102

As this rule there is an exception ex if
bailee destroys the goods, trieb his a
trespass a special action on the contract
for this amount not destroys the contract
of bailment Litt 571. Co Litt 59 (a) Sec 136
5 Bae 266.

To maintain this action the Rep must have
had possession of the property at the time
of the injury done 45 R 459, 75 R 9, 15 R 450
Exp D 313. Ex goods are leased for a
year & an injury is committed the warehouse
can maintain neither trespass nor trespass
77 R 9.

But a constructive possession is sufficient as if
a stranger the not trespasser as if the party
rightfully in possession Ex goods in the
hands of a depository the owner may have
trespass as a stranger But not against the
depository (b) 2 R 259, 5 Bae 164.

(302)

And any person having the real possession
may maintain trespass ag^t a stranger
(this admits of the exception of the
reversioner ante) For the real prop^r
drains after it the right of possession
as ag^t a stranger, 210 211 212 213.
1 Sid 438. 2 Kel 569.

But the real property must be accompanied
with a right of present possⁿ in the owner
i.e. not in actual possession he must
have a right, not of future but of
present possession. In this case it is
held that in special action on the
case lies in favour of the reversioner
ag^t the wrong doer. 1 Ch 2107. 3 ex 209.
359. 2 Pl Ex 133:4. 8 John 432. 11 John 315.

73 R 9 Distinction between trespass & trover. the
2nd 35 latter is founded on property & the former
on possession. But trespass & trover are in
concurrent except in the case of
bailees ag^t whom trover lies, but not
trespass -

etc who has a special property in goods
+ possession, may have the action de
restituta quodammodo a bailor re c. Ex parte
4 Co 14. 2 Bar 47 5 Bac 164

Every bailor may in all cases maintain the
action de restituta quodammodo & the bailor has the
action (wherever he has a present right of
countermand de restituta quodammodo) de restituta quodammodo

o If the bailor of goods delivers the goods to
a stranger the bailor cannot maintain the
trespass, nor trover until demand & refusal
or a legal conversion. 5 Bac 164. 75.

The bailor may in any case demand
the goods even tho' let for ten years for
whatever was the nature of the bailment
this attempt to assign is a breach of trust
and a tort law & destroys the bailment so that
the bailor may immediately demand
restitution —

If goods are sold to A by a complete contract
contract so as to put them in A's hands 5 Bac 164
takes the goods before they are delivered & may
have trespass against D. There is a construction
prop.

(304)

If the effects of a testator are wrongfully
taken away before the will is proved the
Ex^r on behalf of the will & the Adm^r on
behalf of Adm^r granted may maintain
trespass against the taker & 3 B. 268. 17 C. 410
Bac 164.

The adm^r has the construction of his
by the doctrine of relation. the Ex^r has
an interest at the time.

The legatee may have this action for
wrongfully taking a specific legacy
after the consent of the Ex^r tho' the
legatee has not taken actual possession

But the legatee of a residuary part as
of one third of the goods cannot have
this action until after distribution
17 C. 410. & Bac 164.

If trespass is brought for goods belonging
to two or more all the owners must
join in this action but the non joinder
can be pleaded in abatement only
12 C. 2. 1 Rev 304. 11 C. 20. 17 C. 411
18 C. 414. (See books continue)

etc. & trespass will not be for an
act amounting to trespass for by the
combination of the following all the offenders
prop. roots in the crown. Nov 21. 47
dated 144. 46-50 May 12 Stra 172. 1812
1872. Bull. 31.

In Count. this rule is not acknowledged
in particular—

in declaring the law wrong, that the good
be described with confidence certainly
for public & one recovery it may be a law
- the diff must have notice for what good
be a law. Co 35 2 La 1410 1415
405:6 4 Jan 2455. sten 137.

But this rule applies only to cases where the injury to goods is the result of the act of man or where it is occasioned in the taking away the taking is imputed to said man. If inspiration the description may be sent & trespass for breaking open house & injuring his goods. 3 W. 4. 242. 252 & 261.

(206)

and a good description may be left
when it is made pertinent by something
else referred to in the declaration -
Chalk 645. 1 Ver 14

In a declaration relating to goods
a trespass can never be taken with a
contingendo. each trespass sh^d be
distinctly alleged Chalk 631. 9 is lay 25
Ex & 316. 407. 8.

The Pl^y must state a possession in a
property and show a right of prop^y
at the time of the seizure. Chalk
645. 2 Ver 106. Crof 461 Ex & 406.
383. It is a right to the goods and
the goods must be the property of the Pl^y.

The value of the goods must also be stated
but the number on this allegation is
aided by verdict 1 Ver 106. Crof 461
4 Ver 245. Ex & 407. 8. 2 Ver 260

If the 2nd has recovered judgment the
present debt, or apt another for the same
wrong this is a good bar. 1406 123 tra
420. 1007 73. tra 1073. Exp 579. 1010
1011. 1012. 1013. 1014. 1015. 1016. 1017. 1018. 1019. 1020.

the trapdoor must be laid on a day
certain but the 2nd is not confined
(Bull 17. in. 832. 1014. Exp 579. 1020.
407. 415. in front to that day.)

If the 2nd has a license on a particu-
lar day he must traverse that he is
guilty in any other day. vide "Hunting"
1014. 1015. Exp 579. 1020.

When the trapdoor is committed by several
each all may and may not be sued but
he can have only one, ~~that~~ ^{the} ~~trapdoor~~ ^{trapdoor} for
costs. tra 420. 5 Bar 192.

It is so that if one is found guilty & it appears in the rec^d that another person known to the Plt was present & it is further stated that the rec^d is all for not joining the other. But they cannot be less torts are several & any one may be sued alone. 40b194. 57ac192:8. 1 Com^o 41.

Besides in many days practice of some sort in evidence that a co-defendant was not joined & yet they never occasion a non suit & besides one co-defendant is frequently struck out

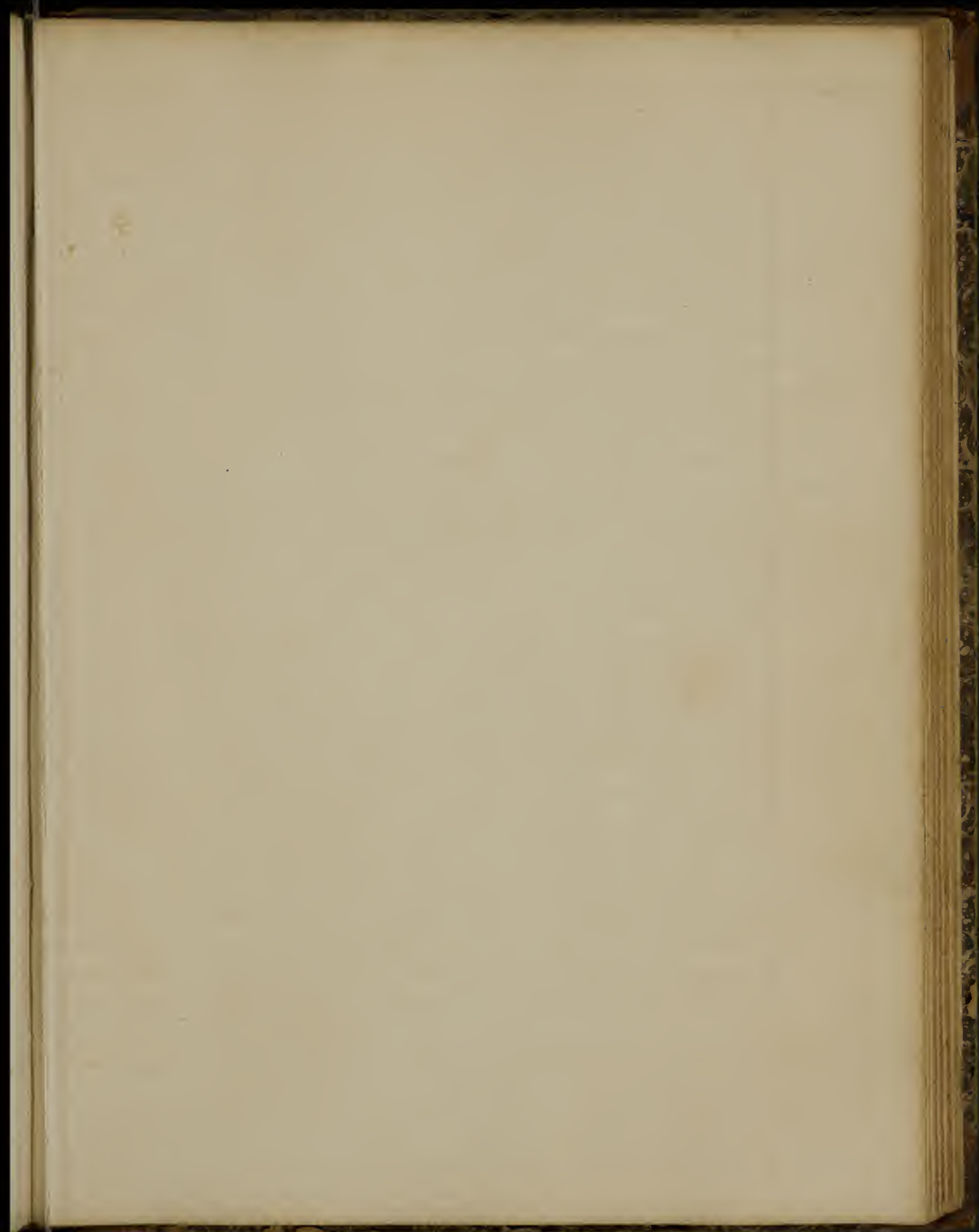
Justifications must be pleaded because inconsistent with not guilty. Further if a justification is pleaded by any one of the defendants shows that the Plt has no cause of action against either of them & this justification is found for this defendant the Plt can have no judgment against either even though the co-defendant was found guilty or it judgment is by default. 1872. 33p 421.

The trespass must be alleged to have
been committed with force & arms - agt.
the peace - or acct of the party in
such case. a capiatue pro fine -
+ Co 39a). 4 Bac 11. Exp D 405. 5 Bac 191.

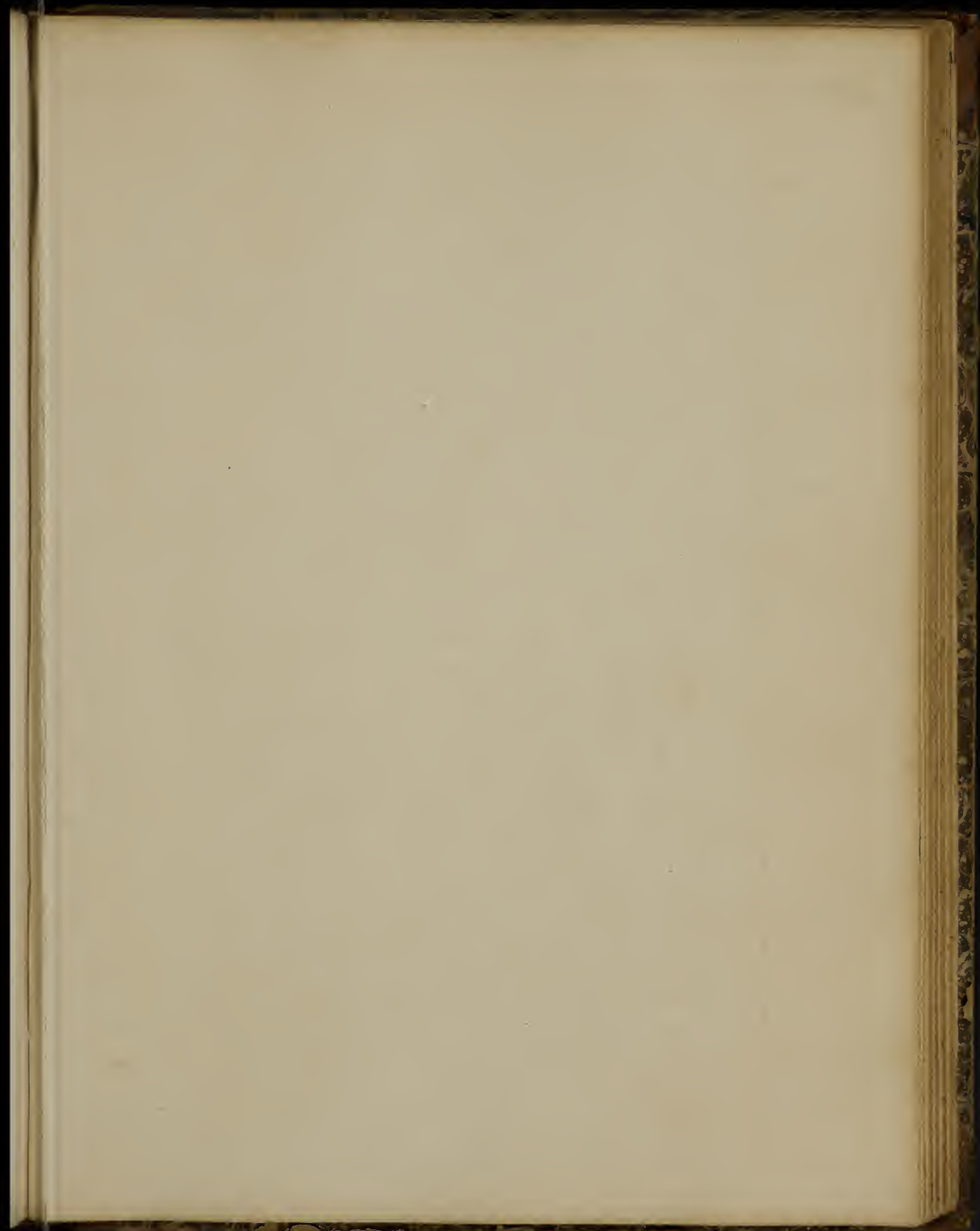
These words are still necessary tho the
judgt is now taken away to let in
the provisions of the st with laty
even tho judgt took 405 Exp D 405
1 Bac 93.

But these words may now be inserted
at any time if omitted.

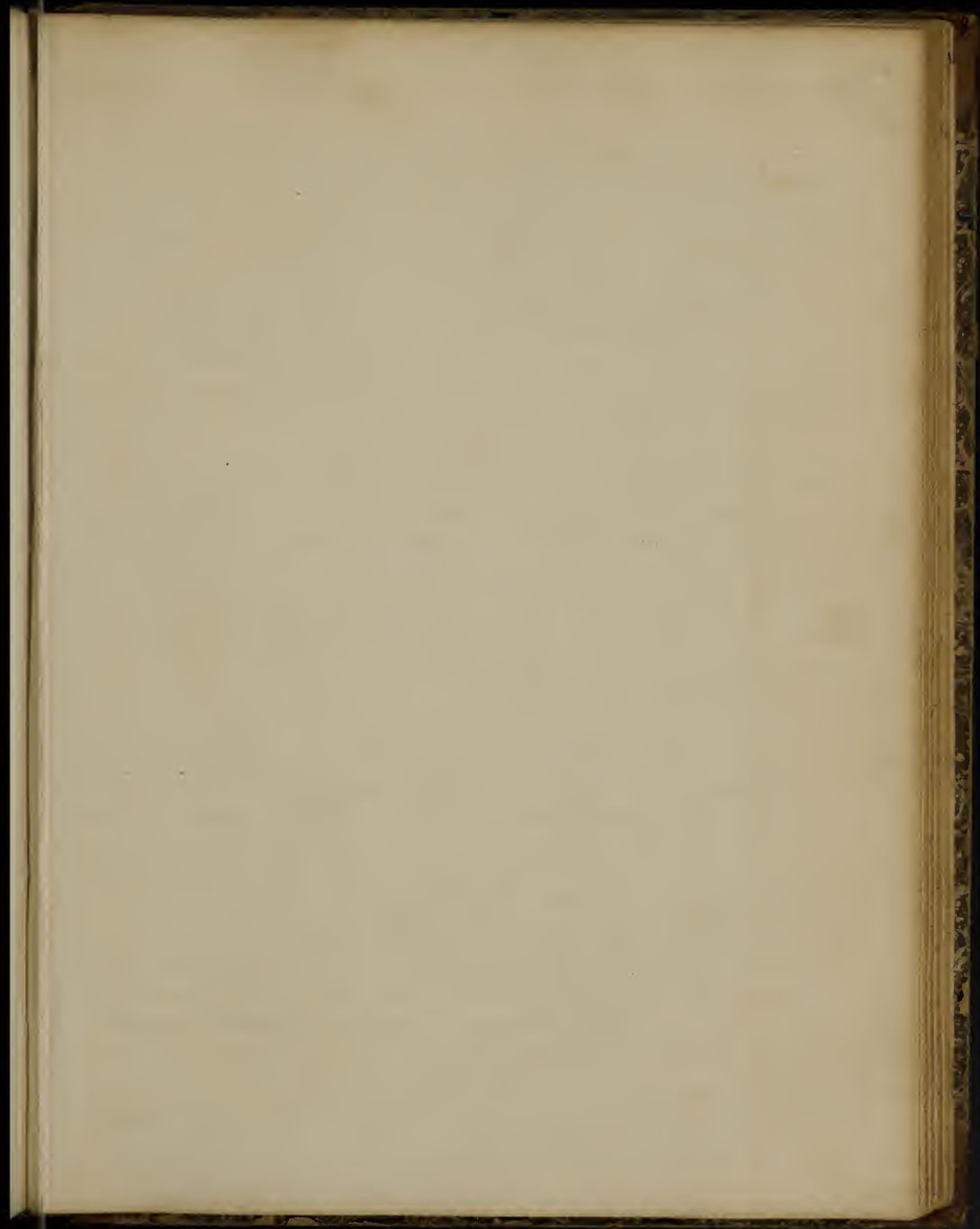
In count these words are but matter of
form.



3124



(314)



(316)

Replevin. (Nov: 1st 1825.)

Has been defined delivery to the owner by legal process of his goods &c when distrained on security to wit 145 given that the property shall be restored to the exp \$340 distrainor if judge goes ag^t the Def in this 4 Bac 372 action. but by this defⁿ replevin lies only where goods are distrained but on this point there is a diversity of opinion. - at least it lies in all cases of distrain.

Distrain is the taking of a personal chattel not 3 B & C. of the poss^r of the person in default to be held by the person taking until redress shall be made to the party injured. but distrain sometimes means the goods themselves taken as well as the act of taking.

By some opinions Replevin will not lie for goods which have been taken by a more trespassing act but only for goods taken by way of distrain. as for rent arrears &c. Bull et P 53. 3 B & C 146. 2 Stra 1154. 1 Wils 672.

But according to others this action lies at - John 140 &c to regain poss^r of goods in any way taken Bull et P 52 from the possession of the owner & this appears imposed Replevin to be the more liberal & better opinion.

However in Court it lies only in cases of distrain.

Co C 524.

1 Sider 47

Defor 3173

Sider (Wheatons)

v2 p 996.

(318)

Replevin

This writ is granted only on security given to try the right & to deliver the ^{property} back to 3 B.C. 13.147 the Deft if judge goes agt the Plf in this Co Litt 145 action. This security is by a recognizance 3 B.C. 347.1 with one or more surety.

By it in Court the security given is not that the goods shall be restored but that the Plf shall try the right & answer all damages if judge goes agt the Plf. The goods are here now restored to the distrainer.

Co Litt 145 By the c. r. if the Plf does ^{not} try the right or if 1 Co 147.2 he fails in his action judge is given de utroque 3 B.C. 147.15 habendo in favour of the Deft. i.e. that the goods be restored to the Deft & he retains them till sufft amends are made by the Plf for the injury for which the distress was taken out in tender of sufft amends the Deft must restore the goods.

Tender of sufft amends before distress taken
renders the distress unlawful. for the object
of a distress is to obtain security for some
debt or duty or satisfaction for some
injury.

So if distress is actually taken & before Bull. 186
impoinding tender of sufft amends is 1 Co 147a
made the detaining or impounding is
unlawful. But after impounding the
goods are in custody of the law & on tender of
amends the distrainor is not bound to deliver them
to the owner — How Cst shall tender of amends be made after impounding.
Again if after judgment given for the distress
tender of sufft amends is made the detainer is 5 Co 357
- or is unlawful & the owner may have 5 Co 76a
detinue or treble. 2 Co 561

Where the original distress is unlawful treble
lies ag^t the distrainor. But when the
original taking was lawful but the dis-
trainer merely detaining the action is treble
or detinue. —

(320)

Replevin.

Distress must always be imposed.
animals in pound breve inanimate
things in a pound coram. 3 BL 12.
Co Litt 47.

In Court we have no such thing as a
pound coram, inanimate things here
remain in the hands of the ~~distress~~ ^{distresser} until
the law shall decide what is to be done
with them.

At C a distress being in nature of a pledge
cannot be sold. 1 Run 588. 3 BL 10. 13.

So by C if animals are distressed the dis-
tresser can never sell them. but under
our law they can be sold & so now in
3 BL 10. Engl: by late Statutes. if the rent is
10:14. not paid the landlord may sell & raise
the rent & pay the balance to the tenant.

But in Engl: now now cattle taken damage
feasant cannot be sold.

In Exceptions. - 5 Co 41. 12 Mod 330 -

When a distress is made replevin is demand-
able as matter of right on suff^t security
offered even if one grants a rent with
right of distress irreplevable still the
distress is releivable the agreement notwithstanding. the agreement is opposed to
good policy. Co Litt 145. 4 Bac 373.

The principal cases in which a distress by
C. L. may be taken are 1st the case of
cattle taken damage feisant. 2^d the case
of rent arrears. 3^d R. v. 7. Co Litt 46. Esp. 55.
364.

There are indeed certain other cases by the
ancient C. L. for neglect of feudal services.

A count distress for rent arrears is out of
use & has been so long out of use that now
perhaps it w^d not be considered as lawful.

In Engl^d the writ of replevin may issue from
Chancery or by an ancient stat. from
the Sh^{ff} of the county & the Sh^{ff}'s writ
order to his bailiff is suff^t not so here
Esp. 346:7 The Sh^{ff} has here no authority to
issue the writ.

(322)

Replevin

As is this writ lies in all cases of distress being taken except that of copious in northernham.

It cannot be that this writ may issue in all cases in which cattle or goods are impounded attached

But in all cases not excepted in the statute are in the construction of the statute only two first, case of cattle damage feasant. 2^d of goods attached. - which indeed it lies in all cases of a lawless taking (ante)

I Cattle taken damage feasant.

When cattle are trespassing on my land I have an action of trespass or I may distress & impound the cattle - but if I distress & they escape by my neglect my remedy is gone, one having made my election I cannot depart from it. But if they escape without any default on my part as if the cattle after they are impounded they die without my fault I still may have trespass, or if they escape thro' the insufficiency of the pound or are rescued &c. &c. 12 Edw 688. 663. 2d Bar 720. 2d Bar 248. 5 Bar 174. lib. trespass.

There is a strong analogy between taking
the body of a debtor in Ex. & the taking of ²²⁰³⁰⁰³ cattle
labeled as a seizure. In both cases while the
pledge is retained there can be no
other remedy.

When cattle are impounded & notice of the
fact given to the owner it is the concern
of the owner to keep the cattle. Our St.
law goes still further here the owner
must within 24 hours after notice given
replevy or redeem them or he incurs a
penalty (which is appropriated to the
foundry of the person who impounded
them is the distrainer) which in the Statute
as revised in 1861 is unappropriated - (Justice Minor
in Wilson v Scott decided that the impounder
might sue for & recover this penalty - The person
for whose protection the stat was made is 1 Geo 5
Co Litt 159. Vent 265. 4 Bac At L &c)

But the owner of cattle must maintain 3 Bl 13.
the cattle impounded after notice of the Co Litt 47.
pound is over not so where they are confined
in pound covert. But if the pound is the common
over pound the owner must take notice at his
peril that his beasts are impounded 3 Bl 13.

(324)

Replevin.

Where judgment is for the debt in replevin in
County the judgment is for damages & the
costs 175 damages are added in the decision we have
2 Pac 372 no judgment de return habendo.

312

If the writ in replevin is taken in County on
this judgment the sureties are not discharged
the debt is in prison or escape.

In County where the owner of cattle distrained
is unknown the distrainer must inform the
constable of the distress made & the
constable must keep the cattle in his own
- in two adjoining towns & if the owner
does not appear within - 4 days the
cattle may be sold & in the mean time
the distrainer must keep the cattle.
(same in case of stray).

One man's cattle may be on the ground of another without being trespassers.

Ex if thro the insufficiency of my fence A's cattle stray onto my land I have no remedy. I can neither impound nor sue in trespass.

But if my fence is in part suff^t and in part not suff^t & A's cattle get in thro the suff^t part I may impound or sue in trespass.

And by our Stat if A's cattle are unusually tho my fence is insuff^t I can have my remedy.

And again if A's cattle enter my land from the highway it is at C in material whether my fences were or were not insuff^t 2 & 13 L 527. for at C & cattle may not run at large in the highway.

But if A is merely driving his cattle from place to place on the highway the owner has no remedy if the fence was insuff^t for this the owner has a right to do.

But by 14 of Count any town may make it lawful for cattle to run at large in the highway. By some opinions the only effect of this bye law is that the cattle cannot be impounded because they are at large. but it seems that it sh^d alter the C & with respect to cattle's straying from highway onto my land -

(326)

Distress - (cattle taken damage feasant)

The principle on which the owner of cattle is liable for their trespasses is that for mischief done by cattle which is common to the species the owner is liable without previous notice - but if the disposition is not common to the species then the owner is not liable without previous notice - & it is the disposition common to all cattle to destroy herbage.

Crop 141

3 Hc 13.

where an animal is distressed damage feasant the distresser may not use the animal & by using them the distresser becomes trespasser at common law relation. he takes upon himself the licence of law & abuses the licence & therefore -

As to land may come in question in this action but the action is clearly a personal not a real action. the value is not recovered. Comb 476:2 27. 4 Bac 373. -

Under it if Count if an animal impounded escapes without fault of distresser the damage done & the boundary he may be recovered by action of debt.

distress at C is except in case of damage feasant
must be made in the day-time - one can impose Co Litt 142
no confidence in the distrainer & he therefore in 101
this respect differs from an off who may at any time 3 Bl 11.
seize goods on legal process. Exp D 300
if distress of cattle damage feasant must be made
while the beasts are on the land of the owner 4 Co 22
- rule formerly the same in case of rent. but 3 Bl 11
now differs by statute. Co Litt 142
Exp D 300

In case of rent arrears by C the landlord might
make a distress to any amt however great but 3 Rev 48
by 52 Hen 3: if landlord takes exceptional distress he 3 Bl 12
is liable in case to the tenant. Stra 551
1 Vent 104.

But for taking exceptional distress trespass lies not - case
is the only remedy. except where the property
taken is of gold or silver coin then trespass lies.
if he takes more than the rent due. 1 Barn 590.

A distress for rent at C is incident to right Litt 215
to those cases only in which the owner of the rent 218.
has the reversion. But where reversioner owns the Co Litt 142:3.
rent without agreement concerning distress the large Bl 42.
confers a right of distress. in the first case there is \$555:0
must be a clause of distress to confer the right
For at C rent is incident to the reversion
But now by 4 Geo 2 distress is incident to rent in
all cases. 2 Bl 43. 3 Bl 11. Exp D 555:6.

(325)

Replevin (in case of goods attached).

In some cases the judgt de returno habendo is now by stat taken away.

by 17 ch 2? if debt prevails he recovers costs & so much damages as the distress is worth, if the distress is worth less than the rent due, he may afterwards distress again & bring an action for the rent. but if the distress is of equal or greater value than the rent due debt recovers costs & in damages the rent due 35 R 344.
2. 4 R 30. 3 R 150. 2 Nels 116. But 5 R 277

Personal propy attached may be replevied by an stat when taken in mesne process. - but pledges must be given that if the Plt recovers damages reft a his sureties shall answer the damages
Ri 174 but in replevin in such case the Plt never
176. sues for damages but merely for his goods
this replevin is in our law called a
mandatory precept requiring the Sh^{ff} to
recover the goods or security given at supra.
that if the Plt in the attachment recovers
the debt his sureties shall answer all damage
demands & dues that shall be recovered

Ri 176 The writ of replevin in this case must be directed
to the same officer who attached the goods

Replevin for goods attached.

Again this writ of replevin must be made returnable to the same Ct to whh the attachment, is returnable & the bond must be taken in favor of the plf in the attachment.

In modern practice this species of replevin is superseded by the practice of receiving the goods attached.

A magistrate taking bonds when replevin is bro't acts ministerially & if the pledges are insufficient the magistrate is liable to the Plt in the attachment.

But if the pledges were responsible at the time of taking the bond the magistrate is not liable.

It has been a question in Conn! whether the Plt's own bond in the writ of replevin may be taken by the magistrate but it has been decided, that such a bond cannot be legally taken, for the bond is no security to the Plt in the attachment. 1 Root 165 & the magistrate who takes such a bond is liable however responsible the Plt in replevin may be.

It has been held that if cts propy is by mistake seized taken on an attachment ag't B. & can't replevy he must sue in trespass the reason given is that replevin is not an adversary suit & that no one except the deft can replevy. But if replevin will lie for a trespassing act it will clearly lie here.

Replevin

If the cattle of a feme sole are distrained & she marries while the distress is held the husband alone must sue in replevin. the property becomes the absolute property of the husband - but if she is joined & no exception taken a verdict cures the defect. sed & guarant. Exp & 375.
Bull & 253. 1 Ed 11: 2.

If after a distress taken the owner dies his Exr may replevy (H).

If the goods of several persons are distrained together by one act the several owners must maintain several actions the interest is several.
Co Litt 145 (H) Exp & 374. Bull & 253.

If goods distrained in a foreign country are bro't here they cannot be replevied here 2 Thom 91.
Exp & 371. Reason assigned is that the distress may have been lawful here & not there or vice versa but the same objection lies in case of trans trespass. but the true reason is that the causes of detaining a claim for which distress is taken are all local

2 Ed 11: 2
Exp & 372
& Bull 255

Replevin lies only for things personal, movable, & it has been held for this reason that it will not lie for a title deed for it is a monument of real prop^y. but the reason is defective - trans lies for a title deed. But if replevin lies only for goods distrained then replevin will not lie for a title deed for it is not subject of distress. but no solid objection ag't the action can be drawn from the rule that replevin lies only for things personal

Return is to be founded on the right of
property not on the fact. Hence it is a good
plea in replication that the property in question is
in a stranger. and it is said to be a good plea both
both in abatement & in bar but I think it is
a plea in bar
Sp 255. 12
2 Ger 2.
243.
Balk 34

Pleading.

The Dec^r always alleges a wrongful taking. Comyn 2
and demands damages. When there is a trial Plea is
in replication the def^t may deny the taking or 2 Saunders 194.
justify it; the taking is denied by the genl 292. 310.
ipse non cepit but on this plea the def^t
cannot claim for by a genl evidence of any just^y 216 Plowd
1 vent 244. Bull N 254. 1. Balk 5. 2 Ger 2. Colled 81.
for to justify & deny are inconsistent.

If def^t justifies in a replication of beasts taken. 3 Bl 150
damage for want he is called the avowant if he 2 Saunders 199.
justifies in his own right or in right of his wife Sp 280.
~~but he is called~~
or a cognizant if he justifies as bailiff

Replication in its pleadings is sui generis. the avow
& cognizant are both pleas & are in nature of colloquy
declarations ag^t the Pl^t & the answer to the Cro 398.
avowry is in nature both of a replication & 3 Bl 150.
a plea in bar. Both parties then become Pl^ts
for both claim a recovery.

An avowry is in nature of a dec^r 1st in every avowry,
the def^t claims a judgment for damages a return of the 216 Plowd.
property taken. 2^d the Pl^t may plead in abatement of 4 Bl 373
the avowry. 3^d the avowry need not close with a oath 102. 112
verification. - 2 Mils 117. Colled 103. Sp 287. 17. Cro 536. 298.

(332)

If ten^{ts} in common lease land & distress & are
sued in respect in they ^{must} ~~must~~ ^{own} severally their
interests are several. ^{Acres of} ~~Acres of~~ ^{1st tenants}.
Cuth 340. 2 & 136 357. Falk 398. 1 Ed Ray? 422.

7 trespass on the case & delicta (No 1)

This action lies II for wrongful acts not accom-
panied with force III. for culpable neglect
and omissions IIIII To recover consequential
damages occasioned by acts which are feasible
Bull 1174. 3 R 1223. Ck 958. 2 R 167.

II Example, trover for conversion - action
for malicious prosⁿ - wrongful escape by Sheriff
Hauder fraud. mala praxis. false return
by Sheriff.

III. Negligent escape. neglect of duty in bailie
ag^t servant for neglect of duty. ag^t ministerial
Officers generally -

IIII. The injury in this case is declared
upon with a per quod. If digging a pit
per quod I break my leg. again my servant
is beaten I bring case for the consequential
damage. stra 636. In this last class of cases 2 R 167
the practice in Engl^d is to bring trespass.
2 R 1895 2d R 1397. 1402 Ck 2194 Bull 174 3 R 1223.

Actions on the case are derived really from
the equity of the Stat of West 2. 13 Ed 1st
3 Bl 51: 2. 3 Reen Hist; C L 19. 243. 25 R 129.
2 Lev 20. 3 Bl 123.

3 Bl 208. In Count our lawyers call actions on the case
3 Re H 249 & delicto trespass on the case
394

The distinction between case & trespass is radical
& a mistake is fatal. reason to be found in
the diff forms of judgment at C L. 5 Bl 191-3.
4 Bl 11. 5 R 125. 2 Llo 131.

Much difficulty has arisen in determining
where trespass & where trespass on the case shall
be brought.

Where there is no force in any part of the
transaction complained of there is no difficulty

where a forcible act is immediately injurious
to another & the redress sought is for that
immediate injury. trespass is the remedy

but where the injury is the remote or consequent
effect of a forcible act trespass on the case
is the proper remedy.

If A commits a battery & B seeks redress for
the injury done by the battery he must bring
trespass for the damage is immediate & redress
is sought for the immediate injury.

But the servant is beaten & it sustains a
loss of service & suits in case it on principle
practice in Enol? differ

If the force complained of has terminated
before the injury complained of begins case
is always the remedy

2 B & R 892. 6 T R 128. 125. 153:4. Bull & P 26.
79. Raym 407. 2 T R 176. 2 Ed Raym 1032.
Sack 380. 2 B & R 476.

The damage complained of to be the immediate
effect of the force employed need not be
the instantaneous effect. If the effect is
connected with a forcible act by an
uninterrupted chain of cause & effect it
is sufft. Ex I cast a ball on the ground
whh bounds & rebounds & finally injures &
trespass is the proper remedy 2 B & R 194. 400

When the proximate cause of the injury is but a
continuance of the original force the injury is in
law immediate but when the force has ceased
before the damage commences & the proximate cause
is not a continuance of the original force case
is the remedy

Exemp gr. A discharges a ball a thorn & stone
or casts an elastic ball whh rebounds & strikes B
or his property trespass is the remedy —

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But where the injury is produced by the intimate voluntary act of a third person the injury is not the effect of the force impressed upon it by the first. the action ag^t the third person is trespass.

If A fires a ball & it glances & enters B's land act of A is trespass. or if A falls his own tree & permits it to fall on the house of B. B's remedy again is trespass. Raym 467. 1 ellod 24. 3 East 523

If A erects a spout on the side of A's building which when it rains casts water on the land of B. B's remedy is case for the act of A & easy before the injury commences. Wright 630. and a distinct cause viz the rain is necessary to complete the injury.

2 BLR 491 But if A cut down a head of water & so trespass deluges B's land B's remedy is trespass. it is the same as if he had pumped the water onto B's land.

Sheppard + Scott.

A threw a lighted squib into a market place
this by exploding came on the stall of B +
B brushed the squib into C's eye C sued A.
+ recovered B was not considered in brushing
it off as a voluntary rational agent he
acted from necessity + in self defence.

Ry 467.

a Genl P D / Mod 24

3 Edw 682

A owned a mad ox he turned it into the
street to make sport the ox injured B.
B brought trespass agt A + recovered for
A set the ox in motion + it is the
same as if he set a cannon ball in
motion. 2 Bl 492-

But where A imprudently rode an untamed horse
into a place of public resort the horse 2 Edw 172
run away with the rider + injured B. case 2 Bl 599
was here held to be the proper remedy
for A was merely passive the act of the
horse was not therefore his act. his liability
arose merely from imprudence -

If in riding I run negligently, or wilfully,
 agt A. As remedy is trespass. the form of
 action depends upon the act & not upon
 the intention, the injury is the immediate
 effect of the act 2 Bl R 199. 2 NR 117.
 3 East 593.

2 NR 117 One case agt this distinction A driving his
 cart negligently run agt B B lost case
 3 East 593 & it was held to be the proper remedy
 15 R 188. but this decision was founded on the peculiar
 3 Com 712 declaration in that case the dec^r did
 not allege that the act was the act of
 the driver.

Bro & Co A discharged a gun & the fire from the
 wadding burnt up B's barn case was here
 held to be the proper remedy. here the
 forcible act ended before the damage
 commenced the burning of the barn was
 a distinct intervening cause

I dig a trench on my own land & thus
divert a water course from B's land
B must bring case - the immediate cause
of the injury is not fault it is a failure
of the stream in consequence of the
fault used by me. 2 Wils 174. Esp D 638.
Stra 5. Stra - 638. 9.

A sues B alleging that B's vessel was negligently
driven agt A's vessel. case was held to be the
proper remedy. Now if the Deft steers his
own vessel agt B's trespass was the proper
remedy - A Pilot probably steered the vessel.
& there is a difference between cases in
which one is sued for his own act & where
one is sued for the act of his servant.
8 D R 188. 3 East 523. 3 Comd R 71:2.

If a servant in driving the wagon of his master
negligently drives it agt another the master
must be sued in case he is not the
trespasser he is liable only on the ground
that he has been negligent in selecting
his servant.

On this principle case was held to be
the proper remedy in 2 D R 446. 7 D R 279.

6 D R 125
2 H Bl 442
5 D R 649.
1 East 100.
1 B & P 472.
Stra 1053.

(340)

When case is brought for a consequential injury arising from force the dec^r is not injured by alleging that the forcible act was with force & arms. that does not make the dec^r a dec^r of trespass for here the force & arms are mere inducement — indeed it is proper to state the force & arms 3 Revere & L 244

Whether the original forcible act which occasions damage was in itself lawful or not does not determine the form of action Scott & Sheppard).

Vide 3 Conn^t R 64 — 2 N R 448 (Day's note.)

in what cases trespass on the case lies.
It lies for a great variety of misfeasances &
non-feasance

3 R202
122

Any mere neglect for which the action lies on the
ground of tort must be of some duty imposed
by law & that neglect must be followed by
damage 20 Ragn 417. Cap & 594. in 219.

In 219 & found paper which was permitted
to decay & injure it was said that it was
liable for no neglect but this is not law.

It lies for any neglect on the part of an officer
of the law to the injury of another -
all ministerial officers. 1 R203. Cap & 603.

It lies agt an agent for any neglect of legal
duty on his part to the injury of his principal
thus for neglecting to make insurance according
to instructions to the damage of the principal.

It lies in some cases agt a foreign correspondent
for not off

It where a correspondent abroad has property of
the principal in his hands & neglects to
make insurance according to instructions
is liable

II Where one has been in the practice of
insuring for another abroad & has given
no notice that he shall discontinue. He is
liable if he fails to insure according to instruct-
-ions -

(342)

III. When one accepts a bill of lading on condition of insuring for the consignee & does not insure the consignee is liable - as an owner would have been liable had an insurance been effected.

Marsh: 74. 205. 6. Park In 303. 75 R 157
25 R 188.

Again a mere voluntary agent if he commences the execution of a trust & does it negligently to the injury of his employer he is liable 1 Esp R 74. Marsh: 206. 7
209.

A person doing business in the line of his profession unskillfully or negligently is liable to the person injured; seeing if one undertakes business not in the line of his business in case of unskillfulness - there is no implied undertaking for skill but in all cases there is an implied undertaking for fidelity. So Raym 214. 2 Wils 359
Esp D 601.

If by negligence or gross ignorance a surgeon is liable in this action this is called mala praxis 1 East 348. But if the person undertaking does not make surgery his profession he is ^{not} to be liable even for want of neglect care & fidelity.
But.

5 Blm
Esp D

But this is not law he does not implicitly undertake to act with skill but any one who undertakes a thing for another undertakes to do it with fidelity.

and this lies agt any one by whom act or culpable neglect the health of another is impaired eg. sells bad wine or provisions or erects a nuisance affecting health

3 Hen 2.166
9 Co 52
Hutt 235
1 Ro 40:5

Where one sells provisions of any kind there is at least an implied warranty that they are good this rule is peculiar to provisions

17 Mo 110
3 Bl 166

In mischief done by a dog the rule is if the dog was added to such mischief & the owner had notice of it the owner is liable at common law not before. We have a Stat making the owner liable notwithstanding this scire.

12 Co 350
2 Jack 62
3 Do 12
Exp 500:2

Scire then at common law is of the gist of the action & must be alleged but if the owner had notice that the dog was added to the biting or killing of animals of a different kind from the one in question he is still liable.

Jack 62
20 Ray 207
4 Co 116
3 Jack 13

In 4 Co 116 it is said that the allegⁿ of scire is not traversable it means however much that it is not the subject of a special traverse

(344)

For an injury done by an animal for a natural the owner is liable without any previous notice of former mischief by the animal. For in law they are presumed to be addicted to certain kinds of mischief.

The ground of action in these cases is negligence

• Disturbance. The unlawfully hindering one from the enjoyment of any lawful right quintly incorporeal rights Ex right to have water flow through my land. Ex again right of way. If obstructed case lies. 9 Co 112. Cro E 845. Stra 5. 638. 3 Lev 266. 3 BL 236. 241. 1 Vent 275. 2 Vent 186.

Escapes. agt Shffs constantly to who permits an escape of one arrested on mesne or final process. But by 1 Rich? 2? Shff is now liable in debt, in case of escape on final process 2 Bac 245. Cro E 17. 25 R 126. 2 H 400. 2 Stra 873.

Vide 'Shffs'

If a ship having arrested one on main process
refuses to take sufficient bail he is liable in damages
to the party arrested. The ship is not made
a trespasser in violation for the refusal is
a mere omission 2 Wils 373. 120 Car 141. or 156.
- Black 11. 5 Co 406. 1 Leon 2189.

This action lies also ag^t rescuers if one
arrested on main process is rescued this
action lies in favour of the ship. Bull & Per
Salcet 211. 406 180. 120 Car 141. Exp & 657. 610.
120 Car 147. In 406 180 it is said that trespass
or can will lie not now

But in this case the ship has no action for
the ship being rescued can suffer no injury

But for rescue or final process can lie in
favour of ship or Officer for rescue or final
process does not excuse the Officer 4 Att 98.
120 Car 77. or 109. Exp & 610.

In an action ag^t rescuers the jury may
give what damages they please. They may
give the full amt of the demand ag^t the
party rescued Bull & Per. Exp & 657.

If the ship in Exple sues the rescuers for expenses Exp & 610
the ship then is unreasonable but there is no
authority.

(346)

can his agt shift for false return in favor
of the party injured by the falsity.
1 Wils 336. Stra 650. Esp & C. 5. Cr. & 729.

Ag^t shift ag^t for omitting to execute
legal process when he ought to have done
so. 2 ellod 23:4. 2 Raym 131.

Atty may be liable for a neglect of duty
to the injury of his client or for professional
misconduct to the injury of the other party
2 Wils 325. 4 Burr 2060. Salk 16. Esp & 617.

Ex where after non suit suffered by
Att^r no Plt his atty entered judge ag^t Plt's case
Esp & 618 was held to lie ag^t the Plt's atty by the
Strick 377. 3 Esp.
ellod 209 2 Pl 165

And if ^{one} by practicing a fraud on a ct. of
justice injures another he is liable. Ex et
personates B & confuses justice. 1 R. 11 100.

can his ag^t magistratus as J P for refusing
to perform off^t duties. Ex magistrate refuses
trial for a bailable offense. So if J P
refuses to certify the acknowledgment of a
deed & sign a writ a certify depositions
to &c. 1 Hank 40 Esp & 618. 1 Leon 327

If the parties to a writ suit settle their
controversy before the writ is returned & the
writ is returned & the debt put to expense 1840 218
for the Def's neglecting to countermand 2 Wils 302
the writ. Debt cannot have cause aq. the
Def

But if Def sh^d proceed he w^d be liable in
malicious prosecution —

case lies for a false return to a writ of
mandamus. for the return is conclusive
& cannot be traversed at c. c.

By b. 21 of return a return of this
kind may be traversed & therefore now
case lies not & it is c. c. here to allow
the return to be traversed & here
therefore case lies not. 1 Vent 111.
Talk 32. Doug 134. Esp & 645.

case lies for breach of trust by bailor. 2 Lo Raym
909. Esp & 618.

lies aq. bailor on the ground of negligence
when the property is injured by a bailee &
that care w^hl the law requires of the
bailor & w^hl the bailor agreed to use.
When the action is founded in negligence
it sounds in tort & the bailor may found
his action on contract 1 East 62. 4 C. 13.
Talk 26. esp & 618. 2 Lo Raym 909.

Vide 'Bailment'

this action lies agt the owner or master of vessels for goods lost by the neglect of the master - this is an exempt case the driver is not liable in case of loss of baggage in a stage coach - the case arises from the law merchant - Dalk 440. esp D 627.

Dalk 440. 4 It is s^d that if the owners are sued they
3d 201 must all be joined or the writ will abate for the right of action agt the owner is quasi ex contractu. But the true rule is if it sounds in tort or if negligence is the gist of the action any one may be sued but if the suit founds in contract all must be joined.
52 R 651. 649. 3 East 62. 76. R 381

1 Mil 441 For any damage done from neglect of duty
Comp 765 or misconduct by a Postmaster he is liable & so are all his clerks. but a Post is not liable for the misconduct of his clerks a subordinate Officer Comp 784. Dalk 17. Esp D 624. formerly supposed contra but a Post is not a common carrier nor the agent of individuals at all. there is no contract between individuals & the Post - the Post is an officer of government. If he selects improper clerks he may be punished for neglect by government. but not by individuals.

(350)

Case for deceit in sale of goods.

- ✓ When the vendor makes a warranty of goods sold with any collateral stipulation & the warranty is false the vendee may maintain an action ag^t the warrantor with giving the vendor notice by with-
returning the horse 1 HBL 17. 2 J R 745.
Esp § 13. (39). 2 Ch Pl 101 (n)

The warranty being false when made is broken so instantly in which it is made & the right of action is complete

- ✓ But where the warranty is connected with an agreement that the vendor shall take back the property & refund the price & the warranty is false the vendee must give notice & return the propy to the vendor for the terms of the contract require this.
2 J R 745. 1 Camb 194. 2. 4 R 573.

In this case the effect of returning the propy is the rescinding of the contract in the former case where vendee brings his suit on the warranty he affirms the contract of sale - But in the present case on tendering the property (or on the vendor's receiving the propy) the contract is rescinded & the vendee may sue in indeb assump^t for the money so paid. - but where the vendor does not rescind the contract indeb ass^t cannot be maintained. 1 J R 133. 136.
Cowp 818. Doug 23. 7 J R 181. 5 East 449. 7 East 274. Comyn C 38.

✓ When the contract is not or cannot be thus
rescinded the action must be on the warr-
anty or on the special agreement or on the
fraud if any but in default of this not.

1 Alw 111. 2 Esp R 42 4 Ellap 135. 7 East
274 2 Ad Raym 753. 2 Conyn C 142 1 H Bl 19. 4 Esp R 6
2 Esp R 639. 2 Camp 416. 1 Ch Pl 344.

But if goods are regularly warranted sound
without any agreement for rescinding the sale
in any event & the goods prove unsound contra
the vendor may sue on the warranty or Comp 818
he may return the goods without the seller's
consent & sue in a pump to recover to 1 Ch Pl 344
price p? this is a recent doctrine 2 Ph 79.
3 Esp 53. 1 Selw 681. 1 Agl formerly otherwise 7 East 274
this doctrine proceeds on the principle which 4 Ellap 505
governs in warranties in policies of insurance
the falsity of the warranty destroys the
sale & is a condⁿ precedent to the right
of the vendor to recover the price.

Doctrine overruled by J 4 in the case of Treas. 22 C 110

Argentine Most Ct Dec 23^d 1825.

(352)

Case, for deceit in the sale of goods.

✓ But under this rule unless the vendor returns the property as soon as the defect is discovered he cannot rescind the contract but must take his remedy on the warranty.
17 R 136. 4 East 449. 75 R 274. 18 R 200. 1
3 Esp R 82. 4 Do 95. 2 Ch Pl 101 (u, t)

✓ An action will lie also for a false & fraudulent representation concerning the quality of goods sold.

But the action will never lie on a false affirmation if the vendor was guilty of any negligence or folly in not discovering the defect or falsity of the affirmation.
Ex I affirm that I will give 100 for this article.

or if the horse has only three legs & the vendor affirms a sound warranty him sound. 20 Ray. 229. 620. 1118. Esp 9624. 10
1 Fomb 110 1 Fulk 24

A genl warranty will not bind the vendor in case of visible defects but a special warranty will subject the vendor even tho' the defect was visible.
Ex I warrant that these rings will not injure his usefulness.

A sold to B a horse having but one eye with
a gent warranty the deft pleaded & after talk 21
judgt the Ct held that the Plf was entitled
to judgt

Again an action will lie against a vendor on
the ground of fraud for artfully disguising
known defects. (he may sue in this
case upon an implied warranty for it
is held that the very act of disguising
known defects amounts to an implied war-
anty) 2 Rul R 5. Peake v 22 q. esp D 29.
32. Peake R 155. even tho the sale was with the
undy without any warranty relation.

also declare also have

primarily held in Court that if one with
hand & science sells property for a sound
price the law implies a warranty that the
property is sound unless the vendor assumes the
risk - But this is not the rule of the
Comm Law. the maxim is caveat emptor
2 Root 407. 2 Swi 120. 100. 3 R 757. Peake R
115. 123. 1 Port C 142. 2 East 514. 1 John 274.
2 John 179.

One exception to this rule in case of promising
3 R 106. 1 Toulb 110.

(354)

Cave, for deceit in the sale of goods.

A vendor of warranted goods does not lie in selling them for full price loose his action ag^t the vendor on the warranty. 25 R 748
14 R 17.

It is held in R 2 that if A sells goods to B with warranty of title & B sells the same goods to C with the same warranty & B is sued by C B may cite in & his warranty to defend the title & if A does not appear & the suit goes ag^t B the record is indecum ag^t et.

If the vendor practices a fraud in affirming falsely that he has title the action lies ag^t the vendor but it is held that scirenia is necessary to make the vendor liable Bull N P 30. 10 R 109.
632. 6 R 109. 35 R 17. 1 John R 129.
2 East 448. Bull. Balk 211.

But where a person sells a personal chattel he does not warrant the title unless the contract is a bargain or hagack & unless the vendor assumes the risk 17 R 109
573 Comyn & action for Deceit a 8 R 22
523. Cro 179. 474. 1 John R 274. 1 R 290.
The very act of selling implies that the chattel belongs to the seller — In the case above therefore if the action is founded on the false affirmation as a fraud scirenia must be proved But the vendor

may sue on the implied warranty of title & here scire facie need not be proved neither need the vendee prove the false affirmation tho' it is well to prove the affirmation because it shows that the vendee did not assume the risk.

But if goods are sold by a bill of sale there can be no implied warranty of soundness for a bill of sale is a deed & a parol warranty cannot be annexed to a deed. the implied warranty is only a supposed verbal warranty. But in such case the vendee may sue for the fraud. 1 John R 503. Exp (248)

And an action will not lie where the sale is by bill of sale on an express contract of warranty by parol. John 414 Exp (248).

(356)

Case, for deceit in the sale of goods

If the vendee is induced by fraudulent representations to dispense with a warranty & to assume the risk the vendee may have an action agt the vendor for these fraudulent representations.

6 John 110. (same in Court.)

Case will lie for injury by false affirmations & fraudulent in the sale of property agt any person not interested in the sale. But in all cases the representation must have been fraudulent as well as false & must also have occasioned damage.

The above rule is late 32 R 51.
1 East 318 2 East 19. 12 East 632. 638. Peak R 226. 3 Bos & Pull 367. 3 John 271. 6 John 81. 1 Do 25.

On the same ^{principle} If I falsely & fraudulently recommend Wm v P as worthy of credit I am liable to one who is induced by this recommendation to trust him. but no man is liable for mere matter of opinion or for expressing his real opinion that It is worthy of credit. N

§ If one person plays with false dice or in any way by fraud damages another he is liable in case.

Co. C 90
Esp. L 633
Bull 32

When an action is brought to recover the price of goods sold either on quantum valebat or on a special agreement, any fraud or deceit ^{may} might be given in evidence to reduce the amt of the recovery. Same where the action is, for labor done.

Rule formerly that where a fixed price was agreed upon the Deft could not mitigate damages by giving in evidence the fraud & deceit to. 1 Camp 49 190. 194 (4)
1 John 453. 1 Esp R 43. (contra 4 Esp 45.
Peak Cr 233. 7 East 479 T. Selw 691.)

If the Deft does not resist the claim by showing the fraud & deceit to he cannot afterwards maintain a cross action for the defect in the goods.

1 Camp 190. 1 John 453. Comyn C NE 187. 1 Camb 4 (n.a.).

1 Com R 420 app. 10 p.

If I by a wrongful act make an innocent person liable over to a third person I am liable to the innocent person to the amt of the injury thus sustained. Ex 1
Drive B's cattle into C's garden & they are distressed
Robt 255
Co. C 125
Carr 3.4.
1 Rol. 100

(358)

If I command my servant to do a wrongful act and the servant does it, supposing that the master has a right to do the act & the servant is subjected to the act, he has his remedy agt me. Or if I direct the sheriff to take A's goods, the sheriff supposing that the goods belong to the debtor in my eye.

Whenever a right vested in the public is obstructed to the special damage of an individual the individual has his action agt the person obstructing. 1 Balk N. S. Co 72:3. Barth 148. If a public nuisance is created & an individual in passing takes his horse he has his action. but if the person damaged by ordinary care might have avoided the damage the person ~~injured~~ by the nuisance has no remedy (formerly diff) (Sh) earth 144 (Ball & P 26) 11 East 60.

This action lies indeed for any nuisance
whatever. Et obstructing ancient lights
9 Co 58. 3 Re 216. 1 Vent 239. formerly
held that the enjoyment of these lights
must have been immemorial but
long enjoyment as for 20 or 30 years is
now sufft. Esp 5636. 2 Saund 175 (a) (H)
1 B & P 400. 11 East 372. such a length of
enjoyment is presumptive evidence of an
agreement that the person having the
lights sh^d. enjoy them.

^{acquiescence in}
But such enjoyment by tenant will not 11 East 372
conclude the landlord a reversioner

How far this privilege of ancient lights
is allowed in this country is uncertain
& it is even uncertain how far it exists
in Engl^d. 2 Court R 597:8.

If a man having built a house on his 1 Lev 12
own land sells it to another neither the 1 Vent 239
seller nor any person claiming under him Esp 5636
can erect a building to obstruct the
lights of the house sold. because my
building so as to obstruct to impair
my grant — this is a strange rule
the purchaser of the building ought
to secure himself by covenant.

(360)

4 Co 58

3 R 267

Exp & 636

But the obstruction of a prospect is
never actionable — a fine prospect is regarded
in law as of no pecuniary value —

But a house built on the line of a public
street is on the street side immediately
entitled to all the privilege of an ancient
mansion, the light cannot be obstructed
nor can any nuisance be put in front of
it. 3 Wils 461. 2 R 24. Exp & 636.

One recover of damages for a nuisance is
no bar to another action for another injury.
damages ~~recovered~~ sustained in the same
nuisance. Cro & 191 2 Leon 103. Exp & 637

The original author of a nuisance cannot
discharge himself from any subsequent injury
or liability by selling the property in
the land on which the nuisance is erected
&c &c. and the purchaser is liable
for any damage sustained by it after
his purchase. in 773. 555. Exp & 637

For the obstruction of ancient lights
an action lies both in favour of the tenant
to whom it is leased & of the reversioner
4 Barn 2141. Cro E 237. or 325. 11 East 372
Esp D 635. 7

Overhanging the selfs house or his land so
as to cast water on the house or land 3 Bl 216
when it rains is an injury for which case 1 Rd 107
lies. *cujus est solum etc.* but mere 5 Co 101
overhanging does not appear to be 1 Stra 634
actionable ~~redress~~. Esp D 637

And if one sh^d erect a house not
overhanging but so as to cast the
water when it rains on to the land 1 Stra 634.
of J. J. He has his action on the case

For obstructing right of way case 6 Co 84
lies — 466
Cr. f 176
Esp D 639.

(362)

A right of way over another's land may be presumed from long & uninterrupted use, 15 years in Conn't suff^t 20 years in Engl^d. Bull. N^o 74. 2 tra 909. 11 East 372 5 Exp 460.

and in favour of the public a right of way has been presumed from an use of only six years standing. But on what principle does not appear 11 East 176 (N) 1 Camp 260.

But when there is a grant the right ceases on the expiration of the grant the use during the time of the grant not being evidence of an abandonment by the owner.

Cro & 191. 3 Bl 217. 9 Co 590, & 12 637. for having a manufactory injuring my crop in the air.

Case lies for obstructing a water course so as to turn it from my mill & land. 1 Will 171. 4 C. 84. 6 East 208. 1 Root 585. 1 Str 5. 2 Com & R 93. 564 8 Mod 156 15 John 212. 16 Com & R 252.

But a right adverse to this original
right may be acquired by 20 years
uninterrupted and adverse use. Ex 8.
A owning land above has for twenty
years diverted the water from the land
of B owning below A acquires the
perpetual right so to divert — 6 East
208. 1 B & P 400. 1 Camp 463. 10 John 241.
15 John 213. 1 Comnt. 382. 2 Comnt. 584.
8 Callap 136. 424, 244. 3 Cairns 217. 6 East 201.

This rule supposes the proprietor below
to have acquiesced in the diversion if
he has been litigating the right the
presumption does not arise,

as to the actions growing out of the
domestic relations vide Master & Servant
Hus & Wife. Parent & Child. Bull NP 78.
Cro J 501. 538. 3 Wils 18. 3 Burr 1878. 2 W R 166.
20 Kay 1032. 2 Maund 169. Comp 54. 2 B & R
387. 3 Burr 345.

This action also lies for the violation of
one's legal franchise. Ex the right of voting
If a legal voter tender a vote & the presiding
Officer rejects it the Off is liable in this
action. Salk 19. 3 Salk 17. Esp 2 647

(364)

in the same principle a candidate
2 Nov 25 for an elective office may have the action
1 Nov 206 agt the returning off or the presiding
2 Nov 50 off for not taking returning counting
3 Feb 20. of the votes
32
Esp D 46

11 May 99 It has also agt the returning off
Esp D 47 for a false return whereby the candidate
loses his office.

18 Feb 18 It has been held in Engl^d that the
6 Feb 45 action lies not agt the returning off
49 agt if Parliament has decided whether
the candidate is entitled to the seat
in case of an election for members of
Parliament. but this rule is now
denied & I think correctly denied
1 Mar 12. (Most of a party)

4 Jan 1308. Two lies at cl for an invasion of literary property
It lies for publishing another's work but the subject
lit copy is now regulated in Engl^d here by statute, under
right our law an author may have the exclusive
privilege 14 years & if he surrenders this 14 years
he may have the term of another 14 years.

It lies patent rights may not be invaded.
(Improvement) but the patent is not conclusive as to
18 Feb 47 the fact of the patentee's being the inventor,
Ball 1870. 78:9. 17 R 602. Esp D 45

Under our St the patentee must be a citizen of the U.S.

The cognizance of questions relating to patents is in the courts of the U.S.

This action will lie in a great variety of cases ag^t the employer of one who injures another in the execution of his employment but if the servant intentionally commits an injury the master is not liable the master is only liable for his servant's negligence while the servant is in the ex^t of his master's business.

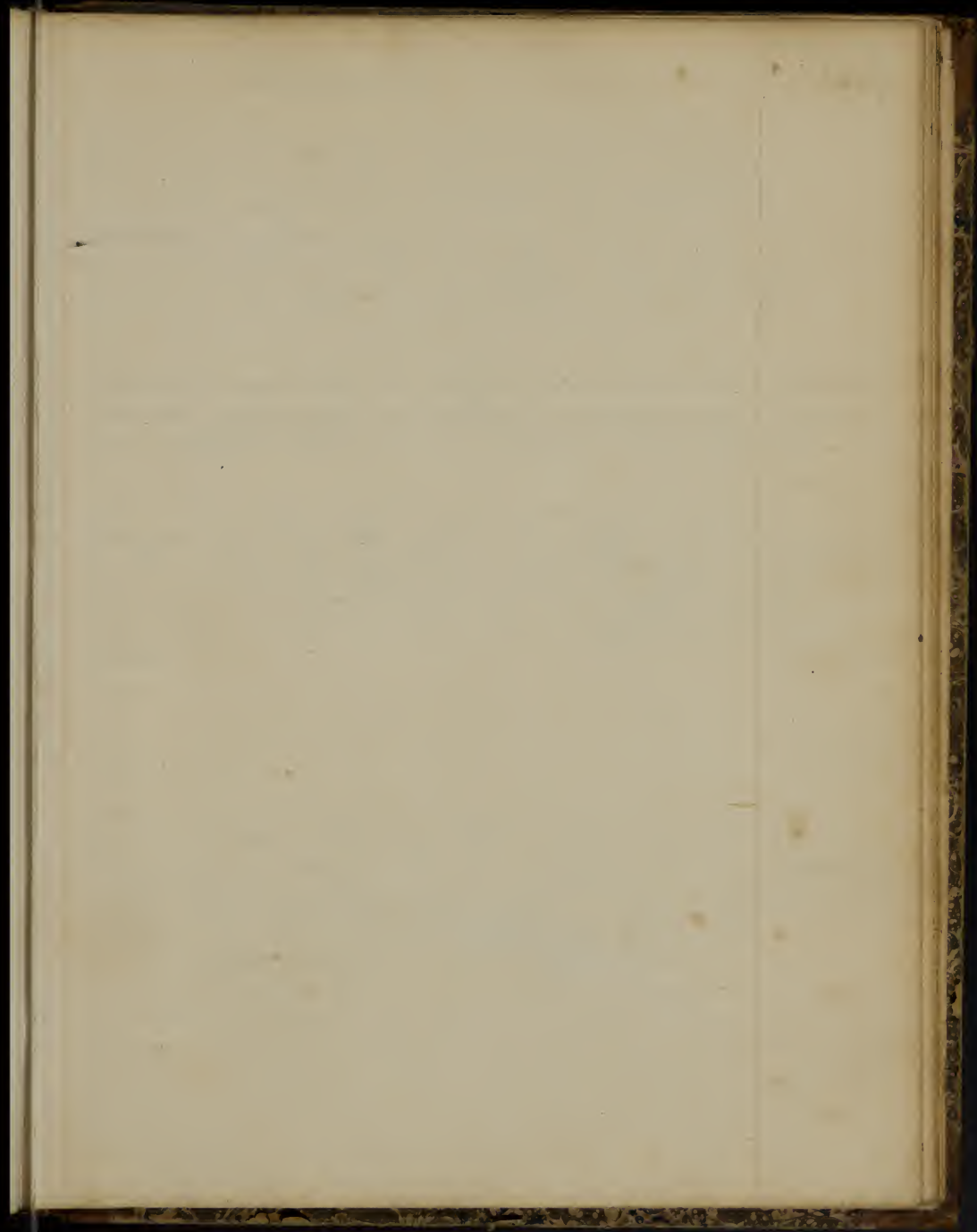
2d Rayn 754
dalk 441
Stra 1083
Dep 2600
2426

Obstruction of legal process.

It is an example prevents the ship from Cr & 908
serving process ag^t B. the ship has his action 5 Cs 97.
ag^t C & it lies also in favour of the Pl^f in the process.

No special action on the case has a precise form of declaration as the formed actions have in the latter certain words are always necessary.

17 R 541
Gill R 192



(308)

Mandamus,

This is a prerogative writ issuing out of
B R & affords specific relief 3 R 110. 2 R 429
1 Vern 175. Held in some of these cases that this
writ may be issued by chancery, but not so
now & in this country it is issued from the
highest Ct of ordinary jurisdiction in the state.

This writ is granted in those cases only in 3 Bac 527
wh the government or public is concerned & 4 Call 281
when witht it there w? be a failure of justice Dory 506.

The genl object of the writ is to enforce obedience
to the acts of the legislature & of the King's 3 Burr 1267
charter & to prevent evils wh w? otherwise Dory 506
arise from defect of police or failure of Comp 377.
justice. 17 R 148.

The particular object of the writ is in genl 11 Co 43
to restore a person to some incorporate or Esp 4661
other right or franchise wh concerning the 3 Bac 529
public, or the administration of justice
or to admit him to such right &c.

(370.)

Mandamus.

The writ is usually directed to some officer, body corporate or inferior Ct

It does not lie ag^t an individual as such
4 Willd 52. 3 B & A 528.

But in cases where the writ is grantable it
is demandable of street right & the Ct of
B & R have no discretion & can impose no
terms 3 B & A tit mand (525).

This writ may be issued to compel a corpora-
tion to call a meeting of the corporation
& if select men refuse to call a town
meeting. Stra 1003. 1157. 1 & 2 Wyl. Raym 69.
Esp & 662.

So it lies to restore a person to every
Rayn 481 description of corporate office, or it may
1 Sid 114 issue ag^t those in favour of town clerk
1 Vent 77 who has been elected & deprived by
4 B & A 1799 the corporation of his office.
Poph 176.
Esp & 661.

Stra 113 It lies to compel persons in authority to
2 Kel 571 do their duty. or ag^t the Ct of probate
Esp & 662. to compel them to grant probate of a will
1alk 249. or ag^t judge of any inferior Ct.
Garth 457.
Sla 552.

Mandamus

It may issue to a clerk of a corporation if he sh^d refuse to deliver up the books to his successor. 1 Stra 174. 1 Will 305. Esp & 663

It is not ascertained by any definite rule what offices do or do not concern the public or the admⁿ of justice

This writ has in modern times been much extended. Office of mayor of a city concerning the public, same of wardens & common council men of cities. same of town clerk constable, parish clerk, sexton in Engl?
11 Co 94. 11 Mod 75. 12 Mod 171. Corp 371. 377.
Raym 211.

The writ again may issue to an inferior to compel the admission of an ally
1 Lev 75. 1 Keble 549. 1 Vent 11.

But the office to which a person can be restored by this writ must it is said be of a certain permanent nature. an off^{ce} therefore under an institution of men voluntary association not endowed or incorporated cannot have this writ. Ex off^{ce} of the masons society. 1 Will 11. 12 R 331 44 R 125. Esp & 665. But the writ might be granted to an incorporated fire men's company.

(372)

Mandamus

The rule requiring the office to be permanent
does not require it to be freehold, it is
sufft. if it is annual (provided the office
has fees annexed it is said) 15 R 146.
Eop D 666.

This writ may be granted in Court to
compel the County treasurer to pay out
money to a creditor of the County
for a county not being a corporation
cannot be sued.

So to command the magistrats of
a County to lay a County tax where it
is necessary, a major part of all the
magistrats of a County are the persons
to lay the tax,

But where an Office is of a nature
merely private this writ is not granted
1 Vent 143. 1 Sidw 46. Eop D 666.

But the writ might I think issue
in favour of a post office, of a
turnpike company. same of Off of an
incorporated bank, 3 Bac 525 (n)

The writ is never granted to compel
an act to be done by a Ct. magistrate. 11 Mod 265
re while it is doubtful whether the Ct. Exp D 665
may be have authority to do the act.

Nor will it be granted where there is
any other specific legal remedy or in
genl where there is any other adequate
legal remedy. Dou 500. Exp D 600

Again it is never granted to compel any
Ct. to do any but the doing of w^{ch}
is discretionary. 2 Stra 581. 2 Bl R 768.
Exp D 668.

If several persons are deprived of office
they cannot have a joint writ because
the wrongs are entirely distinct & several.
Salk 433. Bull et Proo. Exp D 668:9.

The mode of obtaining the writ is, that
the writ is never granted in the first
instance, but the party complaining
applies for a rule to show cause why
such writ sh^d not issue. & the appⁿ
must be founded on an affidavit
on the appⁿ if the Ct. does not see plain
that the writ sh^d not issue the rule issues
& if no cause is shown on an insufft.

Bull et Proo 200
3 Bl 111

(374) Mandamus
one is shown a writ of mandamus
issues in the alternative.

Exp D 669 But in proper circumstances the writ
issues in the first instance

& in general cases, ie in cases of notariety
the writ may issue in the first instance

This writ never issues to prevent a default
all it is apprehended may happen. a Ct
of Equity alone exercises preventive justice.
Bull 149. Exp D 670.

This writ is not directed to the Sheriff
but to the person or persons agt whom
Salk 433. 8 the application is made & delivered
Exp D 671 into their hands & the person to whom
it is directed must at his peril
do the act or make return on the writ
of the reason why he does not do it

If the party does not return at supra
he is guilty of a contempt & may be
proceeded agt by fine & c.

When the duty to be done is to be done by a part of the corporation the writ may be directed to the whole corporation or to the part whose duty it is.

Salk 694
701.
Hart
Exp 6673

When suff^o cause or the rule to show it is not shown 3 B2 111
the writ issues in the alternative requiring the person upon whom the writ issues to show cause or to perform.

If the debt returns a true & suff^o no further proceedings are had at Ct the bulk of the return could not be traversed but now by Statute 1 Vent 111. Salk 32. Doug 134. 20 Reg 46. Exp 648. 3 B2 111
Ct is now not have adopted the rule prescribed by this stat.

If the complainant succeeds on the above issue or in damages he recovers damages & costs on the writ & now therefore he can have no action for false return.

If the return is false he obtains also a peremptory mandamus & the question whether false or not is to be tried by the jury 3 B2 111. Exp 648.
When the return of the writ is insuff^o on the fact it is a peremptory mandamus issues back at Ct and under the St. 3 B2 111. Bull N P 201. Exp 655.

(376)

allaudama

If all the debt join in the false return the action for false return lies not all or any & the action lies for suppression as well as perjurio falsi. Carth 171. 2. Doug 144. Exp D 115. 303m 544

But when the writ is directed to A B & C opposed the false return but was overruled & was not writ. Carth 172. 2d Raym 507. Exp D 115.

If the return is proved false on the action on the case for false return a peremptory mandamus issues of course provided the action dies in the same it from whh the first mandamus issued for then the falsity of the return appears upon the record of the same it from whh the mandamus issued. Salk 470. 3 Bar 544. Exp D 115.

But if the action is, in a diff't case after a recovery in the action on the case the truth of the return must be tried on an issue for that purpose (after the recovery) if the it from whh the mandamus issued, but the record is conclusive evidence. Salk 418. Exp D 115.

303m 146

4 Bar 187

303m 146

2 Bar 421. 74

the 100.

If after peremptory writ to return the writ the debt does not return an attachment for contempt must issue & if there are several debts the attachment must issue ag't all but if some did not join in refusing they are not punished
see on it in the first part of the 100. 100.

If plaintiff fails in respect to the it in the terms
of his return he is liable to attach for 3 B.C.M.
contempt,

(378)

Prohibition

This issue from B R to prevent inferior Ct's
from exceeding its jurisdiction or to prevent
3 B L 112 it from deviating in its proceedings from
Fitz 39:40 any Stat regulation. It may in some
1 P M 476 cases issue from Chancery or from the Exchequer,
1 A B L 476
2 A B L 100. 71:15

This writ is directed to the inf^r Ct & the party
prosecution & is founded on a suggestion or
a statement in writing that the cause of
3 B L 112, action or some collateral question arising out
of it is out of the jurisdiction of the inf^r
Ct. &c

1 P M 476. The first act of the Ct is to issue a rule
talk 549 to show cause, in some cases, this rule must
Hob 79. be founded on an affidavit, when the
Holt 593 want of jur^{is} is appears on the face of
Lo Ray 1211. the dec^{is} or libel in that Ct no affidavit
is necessary, but where it does not thus
appear an affidavit is necessary.

Is the awarding of prohibition ex debito
justitiae or discretionary. Hob 67. Raym 3. 4
qr, 20 Raym 220. 578. 586. talk 33.
1 Hobb 13:14. Mact 224

For the purpose of obtaining this writ the party aggrieved ^{sets forth} in the record his suggestion, ^{that} if the matter suggested is sufficient the writ issues after the rule has been served but if the matter is not sufficient the Ct. proceed no farther. The command in the writ is that the Ct. do not hold plea & the party prosecuting not to proceed.
3 BL 113.

But if the legal sufficiency of the cause suggested is doubtful the mode of obtaining the writ is different the party suggesting is directed to declare in prohibition, i.e. he is directed to file a fictitious declaration stating that the party complained of has proceeded below in contempt of a writ of prohibition, & these allegations are not traversable, hence a writ of error may be brought on the fictitious action, 7 C. 4. 1 L. 125. 4 C. 151. 2, 3 BL 113
Cr. C. 736.

This declaration must follow the suggestion the action is then regularly proceeded with in the result of the cause is adjudged sufficient a writ of prohibition issues against the inferior Ct. & the party prosecuting, 3 BL 113. 4 BL 241. a) Proh.

(350)

Prohibition

2 Bl 114 If the cause appears insufficient the Ct. in judge for the left awarding a writ of consultation supposing that notwithstanding the prior fictitious prohibition the wife Ct may proceed in the trial

3 Bl 114 and the writ of consultation may be issued where there has actually been a writ of prohibition to the wife Ct and this may be done on mere motion of its own or on dect^r filed from the party prosecuting in the inferior Ct traversing the suggestions of the party complaining.

4 Bl 117 Disobedience to this writ is a contempt of Ct.
Fitz 40

It is also a contempt to commence a new suit in the same wife Ct for the same cause 1 Leon 311. 4 Bac 262.

1 Vent 245 On the attachment for contempt the Plf
in 2559 recovers his damages & costs for proceeding
3 Lev 360. in contempt & also a fine is levied

It is Court vests the power of issuing this writ in the sup^r Ct.

Habeas corpus.

This is a writ by which a person in any way restrained of his liberty may be brought before some court for some special purpose. It may be granted on the part of one applying for it or on behalf of some other person who has a right to require his presence. 3 Bl 124.

II Habeas corpus ad respondendum. This is granted where one has already been confined by the process of some inferior to remove the prisoner so as to charge him with some new action in the Ct above. 3 Bl 124. 2 All 128. 3 Bac 2.

This writ is founded in the forms of the English practice it is unknown & unnecessary here.

III Habeas corpus ad satisfaciendum. This issues when a judge has committed a prisoner & the King wishes to bring him up in order to serve him with process of Ex. But our practice does not require this. 3 Bl 124.

The writ can never be granted to bring up
a prisoner of war for such prisoners the
Ct of C. & have no jurisdiction Doug 403.

The proper resort in such case is to the Secy
of state -

Habeas corp. as subjiciendum, is directed to one 1 Bam 671
holding another in custody commanding him 3 RL 131
to produce the prisoner that he may do; submit.
~~at the instance~~ whatever the Ct shall award,

this is the writ by which a man is obtained
from any illegal confinement, 3 RL 131. 12 West 92

But a person imprisoned by either house of parl^t 5 TR 314
for contempt cannot be released by this writ. Rule
the same in this country, the Legislature has
an exclusive right to judge of contempts committed
agt. itself. Doug. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

This writ issues from B.R. or from chancery at Ct Cro 1543.4
known by fiction of issue from Ecclesiam & C Pleas Burr 856.
2 Kent 24.
2 Eldon 198.
2 Hale PC 144.

(354)

But in case of commitment for a crime
alleged the latter Ct. could formerly only
take bail or remand him they c^d not
discharge him for they have no cognizance
of crimes, 3 BL 132,

But under 16 Car 2^d the full benefit of the
writ may be had in either of the four Ct. of
Westminster hall, & may discharge &c,
3 BL 132, 2 Mod 176

In Court by it this writ may be issued by any
Supt. Ct. by any Ct. of C. P. when in session &
by the chief judge of C. P. in vacation,

Alt 350 The writ then is directed to the person holding
Lo Ragn 58 another in custody commanding him to
C18. show the prisoner with the cause of his detention
3 BL 134 if there is probable ground of suspicion he
5 Mod 22 can not be discharged,
1 Vent 330
346

The object of the writ is to afford specific relief to every person deprived of liberty without sufficient cause. 3 BL 135.1
3 Bac 748.

16 & 31. Charles 2^d. regulate chiefly the writ & when our constitutions speak of Habeas corpus, they refer to this writ as regulated by these statutes of Charles.

Since this statute was one of the twelve judges may issue the writ in vacation & a person committed by the Secy of State privy council or King himself may have this writ. 2 Co 174.3
3 BL 131.
135.6.

By Cons. of U.S. the privilege of this writ cannot be suspended except when in time of Rebellion or invasion the public safety requires it & then, it can be suspended only by a statute of both houses & approved by the Pres. C. 165
Art. 1. 59.

This writ will not lie in favour of a person committed on Ex^t or conviction by a court of competent jurisdiction and by 32 Ch 2 the writ is denied in certain cases of treason felony &c. but not so here. 3 BL 136
3 Bac 9.
10 Co 429.
1 Stra 142.

But this writ may be granted not only in favour of a person committed under colour of legal authority but of any person illegally imprisoned. 1 Keb 526. 2 Wils 125. Stra 422.
3 Bac 15. 10 Co 429.

(386)

If one has been discharged by Habeas corpus & the imprisonment is repeated it is a contempt of a Ct. & when there is danger of such repetition the Ct will appoint a guard.

1 Bar 606 This writ may be sued out by the person confined
631 or by a third person calling himself the friend
3 Do 1362 of the person confined.
2 Str 482

Disobedience to this writ in any form is a contempt & no return is made when a return is required, 12 Clod 606, 3 Bac 10 City 68. —

Duo Warranto,
lies agt any one who usurps an office or
franchise wth right or exercises it
after forfeiture. & the object is to remove 3 Bl 262
him from it.

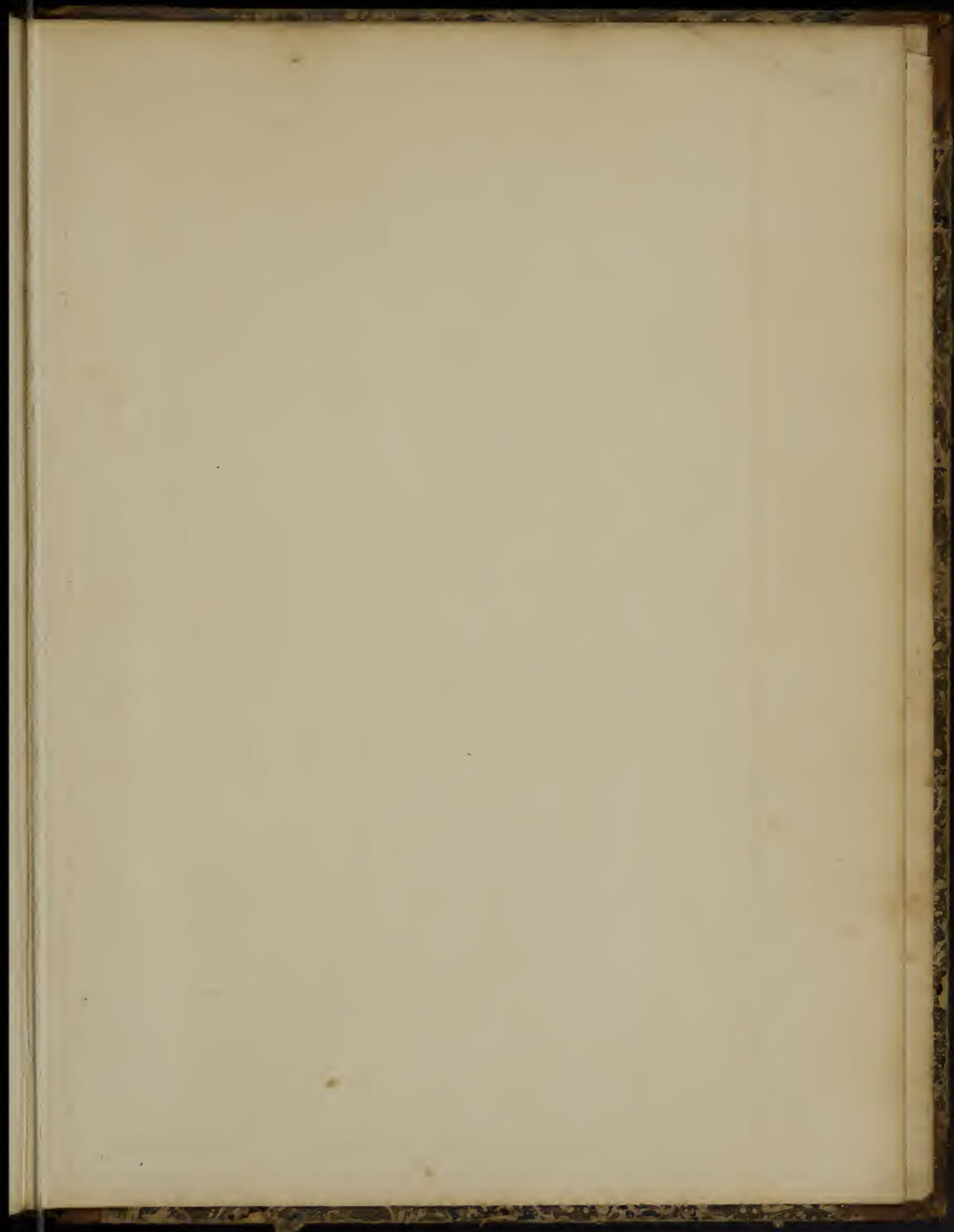
This writ is a counterpart of mandamus
tho, to restore that to remove

This proceeding in modern times is not by
writ but by information by the atty genl
wh^{ch} is a criminal prosecution, 3 Bl 263

The effect of the proceeding is the
removal of the usurping incumbent by
judgt of ouster, &c.

vide Bac Abt tit Duo Ware, Comyn Dig, Duo Warranto.
3 Bl 262 -

(388)

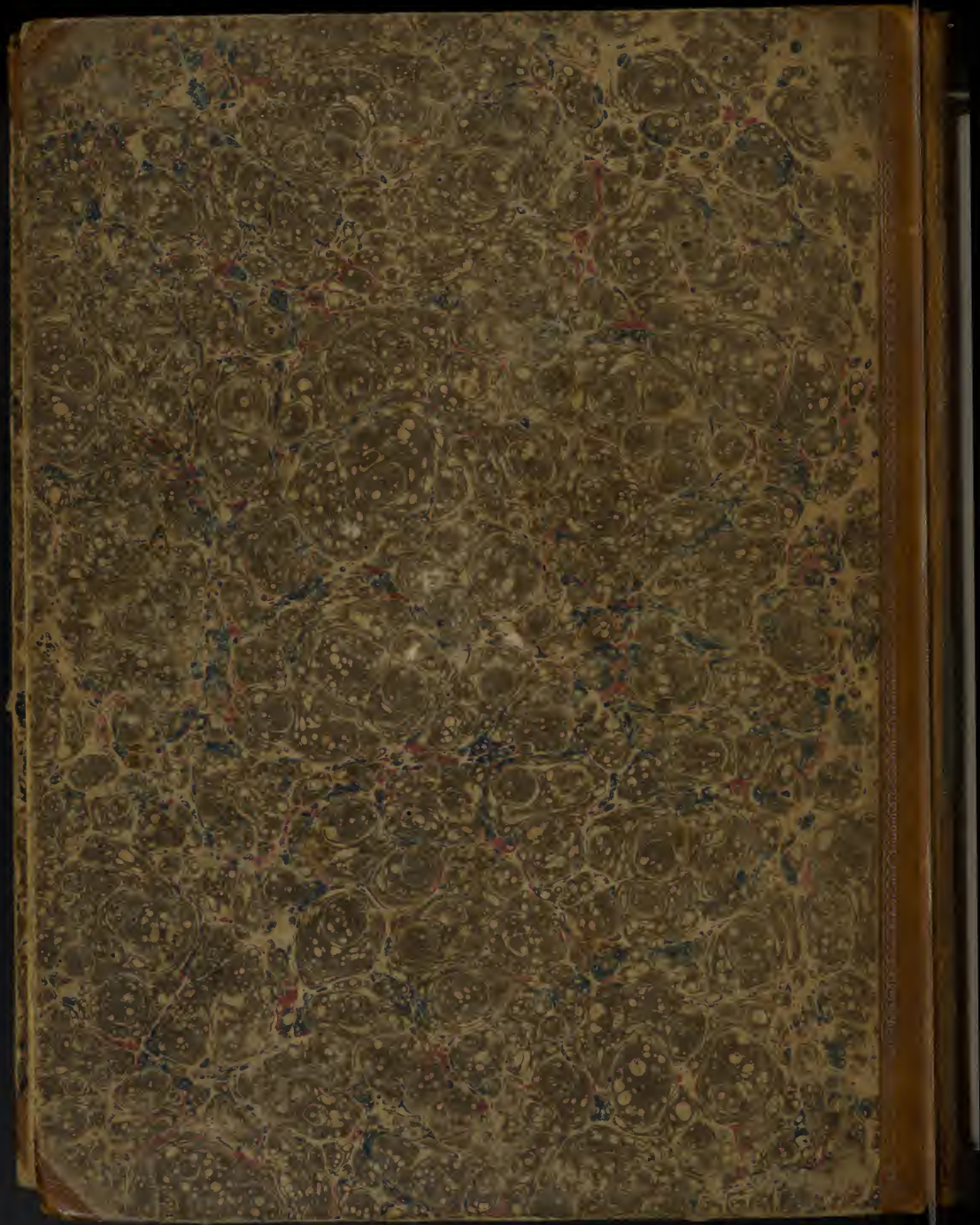


(390)

1. 1000 - 1000

392.

Newby
Tew!



GOUD'S

LETTERS

TO

OF

W. S. F. M. D. R.